Supreme Court, U.S.
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No. 96-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

HOME DEPOT U.S.A., INC.,
Petitioner,

v.

VICKI BUTLER, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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December 12, 1996

QUESTIONS PRESENTED

1. Whether the Seventh Amendment permits the certification of a class action in circumstances where separate "follow-up" juries will be required to reconsider issues that were already decided by a different "common-issues" jury?

2. Whether Federal Civil Rule 23 permits the certification of a class under Rule 23(b)(2), which does not provide any opt-out right, in a case in which the claimants seek no specific injunctive or declaratory relief, but seek significant monetary relief in the form of compensatory and punitive damages, and if so, whether such a certification would violate the Due Process Clause?

LIST OF PARTIES

The ultimate parent company of petitioner Home Depot U.S.A., Inc. is The Home Depot, Inc. Petitioner's direct parent is Home Depot International, Inc., the sole wholly owned subsidiary of the ultimate parent. Petitioner's sole non-wholly owned subsidiary is Newco Productions, L.L.C.

The named plaintiffs in these cases are Vicki Butler, Susan Ellis, Felicia Funderburk, Jaqueline Genero, Sheryle Jones, Kimberly Stoddard, Cheryl Williams, Theresa Frank, Kathrine Toma, and Kathleen York on behalf of themselves and all others similarly situtated, and Jamie Wilson, an individual.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit. Petitioner seeks review of the Ninth Circuit's continuing practice of permitting class certifications in circumstances where many separate "follow-up" juries will be required to reconsider issues that were decided previously by a different "common-issues" jury, which contravenes the Seventh Amendment. Further, in this case the Court of Appeals misinterpreted and misapplied Federal Civil Rule 23(b)(2), which does not provide any opt-out right, by interpreting it to allow certification of a class seeking substantial compensatory and punitive damages under the Civil Rights Act of 1991, Pub.

L. No. 102-106, 105 Stat. 1071 (1991), thus raising due process issues similar to those presently before the Court in *Adams v. Robertson*, No. 95-1873.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is unpublished and is reproduced in the Appendix ("App.") to this petition at 1a. The unreported opinions of the District Court in this case are reproduced at App. 3a and 11a. The reported opinion of the District Court in a virtually identical class action filed against petitioner in the Eastern District of Louisiana, *Griffin v. Home Depot, Inc.*, is reported at 168 F.R.D. 187 and reproduced at App. 27a.

STATEMENT OF JURISDICTION

The Court of Appeals denied petitioner's petition for a writ of mandamus on September 13, 1996, and took the unusual step of ordering that "[n]o motions for reconsideration, rehearing, clarification, stay of the mandate, or any other submissions shall be filed or entertained in this closed docket." App.2a.

Petitioner filed a timely petition for rehearing. The Clerk initially accepted the petition, but later notified petitioner that the petition would not be considered because the Court of Appeals had closed the docket on September 13, 1996 upon entry of the denial of the writ of mandamus.

The Court has jurisdiction to review this petition under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The Fifth Amendment to the Constitution states, in pertinent part: "No person shall be . . . deprived of life, liberty or property, without due process of law."

The Seventh Amendment to the Constitution states: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

This case was certified pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, which is reproduced in full at App. 36a. The pertinent statutory provision, 42 U.S.C. § 1981a, is reproduced in full at App. 37a.

STATEMENT OF THE CASE

1. *Factual Background.* Petitioner, Home Depot U.S.A., Inc. ("Home Depot"), is a rapidly growing retailer in the home improvement industry. It sells products used in construction and remodeling projects, ranging from lumber and building materials to garden items. Home Depot also provides the know-how needed to select and use these products. It presently operates more than 460 stores in 35 States and employs approximately 95,000 people throughout the country.

Home Depot's nationwide operations are divided into several regional divisions. The West Coast Division ("WCD") comprises ten states: Arizona, California, Colorado, Idaho, Nevada, New Mexico, Oregon, Texas, Utah, and Washington. The WCD includes 130 home improvement warehouses/stores in which there are approximately 26,000 employees, about 9,000 of whom are female.

2. *Plaintiffs' Complaint.* In their class-action complaint, the named plaintiffs have alleged both disparate-treatment and disparate-impact gender discrimination. Specifically, they contend that Home Depot has discriminated against females in its WCD with respect to almost every aspect of its employment decisionmaking, including hiring, initial job placement, training, transfers, promotions to supervisory and management positions, and compensation, in violation of both Title VII, as amended, and the California Fair Employment & Housing Act,

Cal. Gov't Code §§ 12900 *et seq.* Plaintiffs allege, among other things, that Home Depot's employment practices are subjective, lacking specific objective criteria for hiring, pay, or promotion, thus giving local managers broad discretion to make decisions that are intentionally discriminatory or that adversely affect women. Plaintiffs further allege that individual class members were subjected to intentional discrimination and suffered substantial damages as a result. Plaintiffs' complaint plainly seeks damages for back pay, front pay, lost compensation and job benefits, emotional distress, humiliation, embarrassment, exemplary and punitive damages, attorneys' fees, and pre-judgment and post-judgment interest. The complaint, however, is considerably less clear with respect to any claim for injunctive relief, seeking only generalized and unspecified injunctive and declaratory relief.

Home Depot denied the material allegations of the complaint and pointed out, in particular, the extraordinary employment opportunities it has generated for men *and* women, as well as its longstanding commitment to equal employment opportunity in the home improvement industry, which historically has not been well populated with women.

3. *Plaintiffs' Request for Class Certification.* Plaintiffs requested that the District Court certify this case as a class action. Specifically, plaintiffs proposed that the claims of discrimination be tried for each class member in two separate phases. At the first phase, a single "common-issues" jury would hear evidence about the allegations that Home Depot had engaged in discriminatory practices and would make findings about liability, punitive damages, injunctive relief and declaratory relief. (8/30/95 Hr'g Tr. at 9). At the second phase, each of the plaintiffs would then litigate the issues raised by the facts of their particular cases before one of numerous "follow-up" juries, which would make findings about "damages issues." (8/30/95 Hr'g Tr. at 24-25).

Home Depot opposed this proposed class certification on two main grounds. First, it argued that the two-phase trial plan envisioned by plaintiffs violated its right to a jury trial under the Seventh Amendment. Home Depot contended that the holistic

nature of the ultimate legal inquiry into intentional discrimination under Title VII requires consideration of the totality of the evidence presented by both parties before a finding of intentional discrimination can be made. Thus, the issue of liability cannot be split up between the class jury in the first phase and the follow-up juries in the second phase without violating the Seventh Amendment.

Second, Home Depot pointed out that plaintiffs' requests for monetary relief in the form of compensatory and punitive damages for mental anguish render this case inappropriate for class treatment under Federal Civil Rule 23(b)(2), which provides no opt-out right for class members. Home Depot argued that this case could not be properly certified under Rule 23(b)(2), and that the use of that provision to certify a class action seeking significant monetary damages is both improper in itself and would violate the constitutional rights of absent class members under the Due Process Clause.

4. *The District Court's Certification Order.* Despite these objections, the District Court certified a class of plaintiffs under Rule 23(b)(2) and defined the class to include: (i) all female employees of Home Depot within the WCD on or after November 5, 1992; and (ii) all female applicants for employment at Home Depot within the WCD on or after November 5, 1992 who were qualified to fill positions of salespersons or assistant managers but who were not hired for those positions. App. 11a-12a. The class currently has more than 217,000 members, which includes about 17,000 current and former employees and about 200,000 applicants. These numbers will increase through normal turnover because the certification order contains no cut-off date for entry into the class.

The court ordered that the litigation would proceed in two separate phases. The initial phase will address "liability and relief applicable to the class as a whole . . . and whether defendant is liable for punitive damages." App. 12a. Then, if discrimination is found, each claimant will proceed to a second phase, which will address "individual compensatory and equitable relief, including entitlement to back and front pay."

App. 12a. For purposes of the first phase only, the court certified the class under Rule 23(b)(2), which allows for class treatment of claims only where injunctive or declaratory relief predominates over claims for monetary relief, and which thus provides no opt-out right. App. 12a, 21a. The court refused to issue any definitive ruling on certification with respect to the second phase, leaving the parties to speculate as to whether it will proceed under Rule 23(b)(2) or Rule 23(b)(3). App. 12a, 23a.

Although plaintiffs have never specified the nature of the injunctive relief they seek (other than job posting), the court rejected Home Depot's argument that this class could not be certified under Rule 23(b)(2). Although Home Depot's financial exposure in this case could exceed $65 billion,[1] the court determined that plaintiffs' "claims for damages are secondary to their primary claim for injunctive relief to prohibit gender biased employment practices." App. 20a. Even though the plaintiffs bear the burden of proving that class certification is appropriate, the court simply characterized Home Depot's argument that the monetary claims for compensatory and punitive damages overwhelm the generalized claim for unspecified injunctive relief as "conclusory, and at this early stage, speculative." App. 21a.

The District Court rejected Home Depot's argument that issues and evidence in the two phases necessarily overlap in an employment discrimination class action where compensatory and punitive damages are sought, and that, as a consequence, the order denies Home Depot its Seventh Amendment rights. App. 21a-23a. In brushing aside these constitutional concerns and granting certification under Rule 23(b)(2), the court relied almost exclusively on cases decided before the passage of the

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[1] The Civil Rights Act of 1991 caps punitive and compensatory damages at $300,000 for each person who can demonstrate that she was the victim of intentional discrimination. With approximately 217,000 potential class members, the potential exposure exceeds $65 billion; that figure does not include potential monetary relief in the form of back or front pay for individual class members.

Civil Rights Act of 1991, Pub. L. No. 102-106, 105 Stat. 1071 (1991), which amended Title VII to permit jury trials and the recovery of punitive and compensatory damages, which were not previously available in such cases. Remarkably, the court cited these older, *bench-trial cases* as support for its conclusion that there was no violation of *the right to a jury trial* under the Seventh Amendment. App. 23a.

5. *The Petition for Mandamus.* Home Depot immediately asked the District Court to certify these issues for interlocutory appeal, pursuant to 28 U.S.C. § 1292(b), but the court denied this request without explanation or analysis. App. 4a.

Home Depot then petitioned the Ninth Circuit Court of Appeals for a writ of mandamus to compel the District Court to vacate its order certifying the class, enter a new order denying certification of the class, and dismiss the class allegations. In the petition, Home Depot again presented the objections it had raised first before the trial court. The California Employment Law Council and Lawyers for Civil Justice asked for leave to file an *amicus curiae* brief on behalf of Home Depot. Home Depot also later moved the Ninth Circuit to consider new case authorities holding that certification of this type of class action is inappropriate.[2] The Ninth Circuit denied Home Depot's petition, its motion to consider new case authorities, and the motion for leave to file the *amicus curiae* brief. App. 2a. What is more, the panel took the unusual step of completely closing the appellate docket in the Ninth Circuit.

On September 27, 1996 Home Depot filed a timely petition for rehearing *en banc*. Three days later, a filing clerk for the Ninth Circuit notified Home Depot that the rehearing petition had been improperly accepted for filing because the docket had

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[2] *See Brooks v. Circuit City Stores*, 1996 WL 406684, 71 Fair Empl. Prac. Cas. (BNA) 102 (D. Md. June 17, 1996); *Zapata v. IBP, Inc.*, 1996 WL327970, (D. Kan. May 15, 1996); *Appleton v. Deloitte & Touche LLP.*, 1996 WL 406175 (M.D. Tenn. July 3, 1996); *McKnight v. Circuit City Stores, Inc.* 168 F.R.D. 550, 1996 WL 549363 (E.D. Va. Aug. 23, 1996).

been closed by the terms of the court's order denying the writ of mandamus. App. 2a. The panel's order thus had the further effect of foreclosing any review of this case by the full court.

6. *Related litigation.* Home Depot is currently defending two other gender-based class action suits. Plaintiffs in *Griffin v. Home Depot, Inc.*, 168 F.R.D. 187 (E.D. La. 1996), allege discrimination in Home Depot's Northeast, Southeast, and Midwest Divisions. Plaintiff in *Tortajada v. Home Depot, Inc.*, No. 96-2927 (D.N.J.), alleges discrimination in Home Depot's nine-state Northeast Division. Although both the *Griffin* and *Tortajada* complaints mirror the complaint filed in this case, and all of the parties are represented by the same counsel, neither of those cases has been certified for class action treatment. Indeed, the *Griffin* court specifically held, in direct contradiction to this case, that certification under Rule 23(b)(2) would *not* be appropriate. App. 33a. The *Tortajada* court has stayed the class-action aspects of that case until the related litigation is resolved. App. 43a.

REASONS FOR GRANTING THE WRIT

Home Depot seeks review of two issues raised by the ruling below, each of which presents "an important question of federal law which has not been, but should be, settled by this Court." S. Ct. R. 10(c). First, the court below upheld the certification of a class action in circumstances where separate "follow-up" juries will have to reconsider issues previously decided by a single "common-issues" jury, in violation of the Seventh Amendment. Second, the court below held that a class seeking significant monetary damages can be properly certified under Rule 23(b)(2), which does not provide any opt-out right, without violating the Due Process Clause of the Fifth Amendment -- the same issue that is currently before the Court in *Adams v. Robertson*, No. 95-1873.

I. THE DECISIONS BELOW HIGHLIGHT THE SPLIT OF AUTHORITY CONCERNING WHETHER THE SEVENTH AMENDMENT PERMITS CLASS CERTIFICATION WHERE SEPARATE "FOLLOW-UP" JURIES WILL BE REQUIRED TO RECONSIDER ISSUES ALREADY DECIDED BY A DIFFERENT "COMMON-ISSUES" JURY.

The order certifying this case as a class action is an example of an increasingly common and controversial form of class certification. In the past, recognition that litigation of a claim would require the consideration of numerous individual issues -- going to the heart of not just the amount of damages, but also the determination of liability itself -- would have led to a denial of class certification. *See, e.g., Alabama v. Blue Bird Body Co., Inc.*, 573 F.2d 309, 329 (5th Cir. 1978). That is no longer the case. Instead, numerous courts, urged on by the plaintiffs' class-action bar, have certified class actions despite the presence of critical individual issues, through the device of certifying only the so-called "common issues" for class treatment. The individualized issues that are not suitable for class treatment are deferred until many separate "follow-up" trials that, at least in theory, will occur after the common-issues trial occurs. We say "in theory" because courts can count on the fact that, unless their decisions are reviewed on mandamus or other means of interlocutory appeal, neither the first phase nor the second phase of such a trial will ever occur because the colossal expense of the first phase and the almost unlimited exposure that could result will force most defendants to settle. *See, e.g., In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir.) (describing the "intense pressure to settle" imposed by such class certification orders as prompting "blackmail settlements"), *cert. denied*, 116 S. Ct. 184 (1995).

A number of Courts of Appeal, however, have examined such coercive class certifications on interlocutory appeal and found them incompatible with the Seventh Amendment and this Court's controlling decision in *Gasoline Products Co. v.*

Champlin Refining Co., 283 U.S. 494 (1931). *See, e.g., Castano v. American Tobacco Co.*, 84 F.3d 734, 750-51 (5th Cir. 1996); *Rhone-Poulenc*, 51 F.3d at 1302-04. Specifically, these courts have found that the certification orders, in trying to separate common issues capable of class treatment from individual issues, violate the Seventh Amendment right "to have juriable issues determined by the first jury empaneled to hear them . . . and not reexamined by another finder of fact." *Id.* at 1303; *see also Castano*, 84 F.3d at 750 ("The Seventh Amendment entitles parties to have fact issues decided by one jury, and prohibits a second jury from reexamining those facts and issues."). In other words, the Seventh Amendment forbids a scheme in which numerous follow-up juries will necessarily reconsider issues already adjudicated by the single common-issues jury. *See, e.g., Gasoline Products*, 283 U.S. at 500.

A. The Certification Order In This Case Violates Home Depot's Seventh Amendment Rights.

The certification order in this case, in trying to separate class issues from individual issues, creates this same type of Seventh Amendment violation. It is a far cry from the customary bifurcation of all liability issues from all damages issues. Instead, the court has subdivided the issue of liability *itself* in a strained effort to make this case fit within the class action model. While a few aspects of liability have been deemed to turn in large measure on issues that are common to the class, others are hopelessly individual and have been left for the follow-up trials. Although the District Court apparently envisioned that it could make a final determination of liability for injunctive relief and punitive damages at the close of the first phase, it is entirely unclear how that would be possible as long as evidence critical to a finding that *any* class member has been the victim of intentional discrimination will not yet have been heard. What is patently clear, however, is that at the end of the common-issues trial, *there will be no final determination of liability with respect to any individual class member*. In reality, the best plaintiffs can hope for is that the common-

issues trial will establish a rebuttable presumption of liability, and that the further disputed individual claims will be determined in the individual class member's favor in the follow-up trial. The problem, however, is that the remaining individual issues are not separate and distinct from the common issues. To the contrary, adjudication of the individual issues will require the numerous follow-up juries to reconsider issues already decided by the class jury and to reevaluate the same evidence.

The considerable overlap of issues and the inevitable need for reconsideration of evidence by the follow-up juries is a function of the nature of plaintiffs' case and the law of employment discrimination as developed by this Court. This is not a case in which plaintiffs are advancing only a disparate-impact claim for which they seek only injunctive relief. Instead, plaintiffs allege a disparate-treatment claim of a pattern or practice of intentional discrimination.

This Court has explained that in a Title VII case the "liability" phase of a class action trial does not result in a conclusive determination of liability for each of the individual plaintiffs. Rather, if plaintiffs meet their burden of proof in this first phase, they merely establish a rebuttable presumption of intentional discrimination. The burden then shifts to the employer in the second phase to prove that the individual plaintiff was denied an employment opportunity for a legal reason. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 361-62 (1977). And as this Court recently clarified, if the employer provides some evidence that its decision with respect to an individual employee was justified by a non-discriminatory reason, and the employee produces some evidence that the proffered legal justification was pretextual, the jury must consider all of the evidence in determining whether or not the preponderance of the evidence supports a finding of intentional discrimination in favor of the individual plaintiff. *See, e.g., St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507, 523-24 (1993); *see also id.* at 533 (Souter, J., dissenting) (complaining that "the Court now holds that the *further inquiry is wide open*") (emphasis added). Thus, if the

employer demonstrates a nondiscriminatory reason for its decision before one of the follow-up juries, and the individual plaintiff comes forward with evidence of pretext, the follow-up jury will need to consider all the evidence -- including all the evidence considered by the common issues jury -- to make a final liability determination.

In a case such as this, it will be impossible for the follow-up juries to determine whether individual class members have been discriminated against without weighing all the evidence (including evidence common to the class as well as evidence that is specific to the class member). The first common-issues jury will make its burden-shifting finding based on both statistical and anecdotal evidence. The subsequent follow-up juries will not be able to make any determination of liability without considering -- which is to say impermissibly reconsidering -- both the anecdotal evidence with respect to those individual claimants and the statistical evidence with respect to every claimant for whom the various presumptions are satisfied such that *St. Mary's* requires the follow-up juries to consider the totality of the circumstances in order to make the ultimate determination whether there was intentional discrimination.[3] This need for the follow-up juries to

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[3] Plaintiffs will try to establish a presumption of discriminatory practice in the phase I trial, in part by showing statistical "underrepresentation" or "overrepresentation" of females in particular job categories in Home Depot's WCD. Under *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 650 (1989), Home Depot has the right to rebut these statistics by showing that they do not reflect the sexual composition of the "qualified population in the relevant labor market." The "relevant labor market" will necessarily vary from phase I, in which plaintiffs allege it will comprise the entire WCD, to phase II, in which the pool will undoubtedly be much more localized. Under *Wards Cove*, Home Depot has a right to challenge the statistics as inapplicable to the relevant labor market during each phase. The follow-up juries will therefore necessarily re-evaluate the validity of plaintiffs' statistical evidence (and the sufficiency of plaintiffs' discrimination claims) in violation of the

reconsider and redetermine issues heard by the common issues jury -- in addition to rendering the class jury proceeding an expensive waste of time -- violates the Seventh Amendment.

In short, the relevant evidence simply does not cleave neatly into bipolar worlds of "common" evidence and "individual" evidence, which may be considered in isolation from each other. Instead, the law requires juries to evaluate both forms of evidence side by side, as they pertain to each individual plaintiff, before making a determination of liability based on the totality of the circumstances.

The extent of this inevitable overlap is evident, for example, with respect to specific issues such as the following:

Example One -- Initial job assignments: Plaintiffs focus on the alleged fact that women are assigned to cashier jobs much more frequently than men. The parties disagree as to why that is true. Plaintiffs ascribe the disparity to gender discrimination; Home Depot relies on the unremarkable fact that it often makes initial job assignments based on the previous work experience and stated preferences of the job applicant. This evidence rebuts not only the source of the claimed statistical disparity and so the probative force of the statistical evidence, but also bears upon the individual claims of the class members. Thus, no matter what is decided in the common-issues trial at the first phase, resolution of a claim of alleged discrimination in initial job assignments by later follow-up juries will necessarily require reexamination of Home Depot's general hiring practices. In particular, it will require reexamination of Home Depot's practice of assigning new hires to the jobs they apply for, in conjunction with an analysis of the claimant's job application and previous experience (as well as other claimant-specific evidence), to determine whether gender (as alleged by plaintiffs) or stated job preference and/or prior experience (as contended by Home Depot) explains the initial job assignment.

Example Two -- Pay disparities: The same is true with respect to pay. Plaintiffs contend that women's entry-level pay is generally less than that of men and that the reason, again, is

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Seventh Amendment.

gender discrimination. Home Depot cites a number of nondiscriminatory factors, including the applicant's immediate past salary and the amount of salary requested by the applicant, as nondiscriminatory bases for its initial pay decisions. Once again, this evidence both presents a nondiscriminatory reason for any claimed statistical disparity while simultaneously negating the specific claims made by individual class members. Any individual claim based on the initial pay rate would necessarily require reexamination by a follow-up jury of Home Depot's standard practices, along with a review of the claimant's application, including the pay level requested, salary history, previous experience, and the position assigned. The many follow-up juries would not be able to perform their functions without reexamining at least some of the issues already addressed in the first phase by the common-issues jury.

In sum, the certification order here raises the Seventh Amendment problems identified in the *Gasoline Products* case with a vengeance. *Gasoline Products* established that even the customary separation of the entirety of liability issues from the entirety of damages issues cannot be made without a careful analysis to ensure that the two sets of issues are sufficiently distinct to preserve the substance of the Seventh Amendment right to a jury trial. In *Gasoline Products* itself, the Court determined that "the question of damages on the counterclaim is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to the denial of a fair trial." 283 U.S. at 500. The Seventh Amendment violation here -- where the question of liability itself is subdivided between two juries -- is even more glaring.

B. There Is A Substantial Split Among The Circuits On This Important Constitutional Issue.

That the District Court and the Ninth Circuit have certified this class action in the face of this serious constitutional problem is no accident or a mere case-specific misapplication of *Gasoline Products*. The Ninth Circuit has expressly rejected

the analysis of the other Courts of Appeals in the course of disregarding the Seventh Amendment problems raised by this novel and coercive form of class certification. Most recently, in *Valentino v. Carter-Wallace*, 97 F.3d 1227 (9th Cir. 1996), the Ninth Circuit rejected defendants' argument that a separate trial of "common issues," which would leave individual liability issues for the follow-up juries, violated the Seventh Amendment. *See id.* at 1232. The Ninth Circuit explicitly declined to follow the contrary view of the Seventh Circuit in *Rhone-Poulenc*:

> This constitutional concern of the *Rhone-Poulenc* court may not be fully in line with the law of this circuit, and constitutional issues were never squarely presented to the district court. *See Arthur Young* [*& Co. v. United States Dist. Ct.*, 549 F.2d 686, 696 (9th Cir.), *cert. denied*, 434 U.S. 829 (1977)].
>
> We therefore do not accept Carter-Wallace's invitation in this case to adopt the principles of *Rhone-Poulenc* as the law of this circuit.

Valentino, 97 F.3d at 1232.

As *Valentino* indicated, the Ninth Circuit has long taken an inhospitable view of the Seventh Amendment guarantee established in *Gasoline Products*. In *Arthur Young*, the Ninth Circuit rejected, on mandamus, a claim that a class certification order premised on a two-phase trial in which certain liability issues would decided before a class jury, while others would await follow-up juries, violated the Seventh Amendment. *See* 549 F.2d at 693-97.

Nor is the Ninth Circuit alone in taking this narrow view of the Seventh Amendment. Recently, in *In re Copley Pharm., Inc.*, 161 F.R.D. 456 (D. Wyo. 1995), the court surveyed the circuit law with respect to this issue, and identified a number of cases outside the Ninth Circuit that expressly or implicitly rejected Seventh Amendment concerns with respect to class certification orders that separated common issues from individual issues in an effort to facilitate class treatment. *See id.* at 462-64. Among the decisions identified were *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988); *In re*

School Asbestos Litig., 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 915 (1986); *In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989); and *Central Wesleyan College v. W.R. Grace & Co.*, 6 F.3d 177 (4th Cir. 1993). Emboldened by this circuit court precedent, *Copley* dismissed *Rhone-Poulenc* and its view of the Seventh Amendment as representing "the exception rather than the rule." 161 F.R.D. at 462. The Court concluded:

> This Court chooses to join those courts in their progressive treatment of mass torts and disagrees with the Seventh Circuit's decision to take a massive leap back to the time before Rule 23 class actions. The weight of the current law demonstrates that the Seventh Amendment is not violated by the separation of common issues of liability for class treatment.

Copley, 161 F.R.D. at 464; *accord Shores v. Publix Super Markets, Inc.*, 1996 WL 407850 (M.D. Fla. Mar. 12, 1996); *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439 (N.D. Cal. 1994).

Recent decisions of the Fifth and Seventh Circuits take a sharply different view. The Seventh Circuit analyzed the Seventh Amendment issue in depth in *Rhone-Poulenc*. In that case, the District Court certified a class of hemophiliacs who alleged that suppliers of blood products acted negligently in failing to screen blood to detect the HIV virus. The trial court envisioned that common issues, such as whether the suppliers acted negligently, would be tried by a class jury, with individual issues, like comparative negligence and proximate cause, to be adjudicated by follow-up juries. The Seventh Circuit granted a petition for mandamus based in part on the failure of this trial plan to comply with the Seventh Amendment. The Seventh Circuit recognized that "[t]he right to a jury trial in federal civil cases, conferred by the Seventh Amendment, is a right to have juriable issues determined by the first jury empaneled to hear them (provided there are no errors warranting a new trial), and not reexamined by another finder of fact." 51 F.3d at 1303. The court acknowledged that some bifurcations -- like the customary division between liability and

damages -- are compatible with the Seventh Amendment, but emphasized that "that the district judge must carve at the joint." *Id.* at 1302. The Seventh Circuit concluded that dividing the elements of liability between those suitable for class treatment and those that are too individualized for common adjudication does not result in a clean division of issues that is compatible with the Seventh Amendment: the individual "issues overlap the issue of the defendants' negligence." *Id.*

The Fifth Circuit recently followed the Seventh Circuit's lead in *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *see also McDaniel v. Anheuser-Busch, Inc.*, 987 F.2d 298, 305 (5th Cir. 1993). In *Castano*, the Fifth Circuit reviewed a District Court's order certifying a nationwide class action including all past and present smokers. The certification order purported to separate common issues relevant to the defendants' conduct from individual issues concerning the conduct and decisions of each smoker, and certified only the former issues for class treatment. In reversing the certification order, the Fifth Circuit stressed "the risk that in order to make this class action manageable, the court will be forced to bifurcate issues in violation of the Seventh Amendment." 84 F.3d at 750. As in *Rhone-Poulenc*, the court recognized that "[t]he Seventh Amendment entitles parties to have fact issues decided by one jury, and prohibits a second jury from reexamining those facts and issues." *Id.* The court concluded that in light of the need for impermissible reexamination of the common issues by the individual follow-up juries, "class treatment can hardly be said to be superior to individual adjudication." *Id.* at 751. In reaching this conclusion, the Court expressly relied on the Seventh Circuit's decision in *Rhone-Poulenc* (and, of course, this Court's decision in *Gasoline Products*). Other courts have likewise adhered to this reading of the Seventh Amendment and the *Gasoline Products* decision. *See, e.g., Franchi Construction Co. v. Combined Ins. Co. of Am.*, 580 F.2d 1, 7-8 (1st Cir. 1978); *Celestine v. Citgo Petroleum Corp.*, 165 F.R.D. 463 (W.D. La. 1995); *McKnight v. Circuit City Stores, Inc.*, 168 F.R.D. 550, 1996 WL 549363 (E.D. Va. Aug. 23, 1996).

This circuit split represents two different and irreconcilable approaches to the interplay between the Seventh Amendment and the class action vehicle for trying individual claims. It is not simply a matter of some courts approving skillful bifurcations while others disavow more problematic subdivisions of related issues. The split of authority runs much deeper. In many of these cases, the same plaintiffs' lawyers and the same trial plans are involved.

The decisions that allow class certification of common issues uniformly stress the efficiency of allowing the class action to go forward. *See, e.g.*, *Valentino*, 93 F.3d at 1232-33; *Central Wesleyan*, 6 F.3d at 185; *In re School Asbestos*, 789 F.2d at 1008; *Arthur Young*, 549 F.2d at 696. These courts have suggested that the common-issues trial will result in "[s]ignificant economies," *Central Wesleyan*, 6 F.3d at 185, and "substantial savings in time and resources," *In re School Asbestos*, 789 F.2d at 1008. In addition, these courts have tended to reiterate this Court's observation in *Gasoline Products* about the need for flexibility in interpreting the Seventh Amendment's protections. In *Arthur Young*, for example, the Ninth Circuit observed that "*Gasoline Products*, with its emphasis on the substance of the right to a jury trial rather than its form, speaks directly to contemporary courts faced with modern litigation of substantial complexity." 549 F.2d at 693; *accord Copley*, 161 F.R.D. at 463.

By contrast, the decisions that deny class certification in the identical posture emphasize strongly that efficiency concerns cannot trump the command of the Seventh Amendment, and stress the actual holding of *Gasoline Products*, rather than its dictum. As the First Circuit concluded, while concerns with efficiency "are undoubtedly important, they should not control the decision to conduct separate trials before different juries if the issues to be so tried are not separate and distinct." *Franchi Constr.*, 580 F.2d at 7. Likewise, the Fifth Circuit has rejected the argument that these unprecedented class-action proceedings are simply a modern adaptation that retains the substance of the traditional jury trial as it existed at the common law. Instead, *Castano* concluded that "'traditional

ways of proceeding reflect far more than habit. They reflect the very culture of the jury trial,'" which is violated by placing some of these issues before a single class jury and reserving the remainder of them for numerous subsequent follow-up juries. *Castano*, 84 F.3d at 751 (*quoting In re Fibreboard*, 893 F.2d 706, 711 (5th Cir. 1990)).

This split in authority, moreover, is not limited to mass tort cases, but is also increasingly evident in the Title VII context because of the significant changes effected by the Civil Rights Act of 1991 ("CRA"). Prior to 1991, class-action litigation involving claims of employment discrimination was commonly divided into separate phases because Title VII litigants had no right to a jury trial, and therefore the Seventh Amendment was not implicated by such proceedings. *See e.g.*, 5 H. Newberg, *Newberg on Class Actions* § 24.123, at 24-414 to -416 (3d ed. 1992). The CRA changed all that by permitting litigants in Title VII cases for the first time to recover compensatory and punitive damages, and by creating a new right to a jury trial in all cases in which damages are sought. As a result -- and especially in light of this Court's recent clarification in the *St. Mary's* decision that the Title VII inquiry emphatically requires consideration of the totality of the circumstances, *see* 509 U.S. at 507, 523-24 -- those class-action bifurcations that were customary before passage of the CRA are now fraught with Seventh Amendment problems.

Some courts have recognized that the addition of a jury trial right requires a fundamental reconsideration of the use of class actions to adjudicate claims of intentional discrimination. For example, in *McKnight v. Circuit City Stores, Inc.*, 1996 WL 549363 (E.D. Va. Aug. 23, 1996), the court acted *sua sponte* to decertify a Title VII class, after recognizing the problems presented by bifurcation in this context:

> When all is said and done, even if plaintiffs are able to establish that Circuit City's allegedly excessive subjective decision making is a corporate device which makes individual cases of discrimination possible, or even probable, the focus of each individual plaintiff's proof, defendant's response to

> each plaintiff, and the jury's inquiry is whether each individual employment decision was motivated by intentional racial discrimination.

Id. at 4; *accord Brooks v. Circuit City Stores, Inc.*, 1996 WL 406684, 71 Fair Empl. Prac. Cas. (BNA) 102 (D. Md. June 17, 1996); *Zapata v. IBP, Inc.*, 1996 WL 327970 (D. Kan. May 15, 1996); *Appleton v. Deloitte & Touche LLP.*, 1996 WL 406175 (M.D. Tenn. July 3, 1996).

Other courts, however, blithely continue to apply pre-1991 precedents without regard to these important Seventh Amendment problems. *See, e.g., Shores v. Publix Super Markets, Inc.*, 1996 WL 407850 (M.D. Fla. Mar. 2, 1996). That same oversight was no doubt a major factor contributing to the error made in the instant case, for the District Court, with one lone (and entirely inapposite) exception,[4] relied exclusively on pre-1991 cases to support its decision to pursue a two-phase trial plan in which liability issues would be subdivided based on the suitability of the evidence for class treatment.[5]

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[4] The sole post-CRA precedent relied on by the District Court was *Arnold v. United Artists Theatre Circuit Inc.*, 158 F.R.D. 439 (N.D. Cal. 1994), which involved a disability discrimination claim by customers -- not employees -- of a movie theatre alleging discriminatory access. The plaintiffs' primary objective was injunctive relief to compel the owners of the theatres to make them accessible for wheelchairs, and so they sought only the statutory minimum damage award. Thus *Arnold* is factually inapposite and provides no support for the District Court's conclusion in this case.

[5] Commentators examining the implications of the 1991 amendments contained in the CRA have also acknowledged the Seventh Amendment problems raised in this context:

> The availability of jury trials and individualized determinations of money damages [in Title VII actions] may work to the disadvantage of certain plaintiffs by making class action suits impracticable for intentional discrimination claims . . . . Under the old regime of bench trials and equitable relief only, courts generally proceeded with class action pattern-or-practice suits by bifurcating

The Court should resolve this split among the circuits at the earliest opportunity. This division of authority with respect to a fundamental constitutional issue creates substantial disruption in the context of both mass torts and employment discrimination litigation. The experience of Home Depot in this litigation provides a clear example. Two other regional class actions have been filed against Home Depot, raising essentially the identical claims. While the suit that was filed in Louisiana -- the land of *Castano* and *Celestine* -- has not been certified (and certification under Rule 23(b)(2) has been ruled out), the same suit filed in California -- where *Valentino* and *Arthur Young* define the law of the Circuit -- has gone forward as a class action under Rule 23(b)(2). The rights of defendants and potential class members should not depend on the fortuity of where the plaintiffs' class-action counsel decides to initiate suit. Moreover, the fairness concerns raised by this split are particularly acute in light of the recent trend toward the filing of nationwide class actions. In such actions the lawyers for the putative class have almost unlimited discretion to choose their forum. Since such a class action can literally be initiated anywhere in the nation, the split of authority will draw cases, not to the most natural forum, but to the forum with the most accommodating position on the grave Seventh Amendment issues raised in these kinds of cases.

> determinations of equitable relief. Under the new system, either party may demand a jury trial. Employers may argue that they have a Seventh Amendment right to have the same jury determine liability and damages.

David A. Cathcart & Mark Snyderman, *Employment and Labor Law, The Civil Rights Act of 1991*, C983 ALI-ABA 189, 215 (1995); *see also* 3 *Manual for Complex Litigation* § 33.54, at 354-55 (1995).

II. THIS CASE ALSO RAISES THE INTERPRETIVE AND CONSTITUTIONAL ISSUES THAT THE COURT REVIEWED BUT WAS UNABLE TO RESOLVE IN *TICOR TITLE INS. CO. v. BROWN*, AND THE CONSTITUTIONAL ISSUE ON WHICH THE COURT HAS AGAIN GRANTED REVIEW IN *ADAMS v. ROBERTSON*.

The Court granted certiorari in *Ticor Title Ins. Co. v. Brown*, 114 S. Ct. 1359 (1994), to consider whether, in a class action that includes claims for significant monetary damages but is nonetheless certified under Federal Civil Rule 23(b)(2), due process requires that individual class members have an opportunity to opt out of the class. *Adams v. Robertson*, No. 95-1873, in which the Court has granted certiorari and will soon hear oral argument, raises substantially the same issue under Alabama Civil Rule 23, which is modeled on Federal Civil Rule 23. *See Adams v. Robertson*, 676 So.2d 1265, 1268 (Ala. 1995), *cert. granted*, 117 S. Ct. 37 (1996). Home Depot has raised the same constitutional issue in this case, contending that certification of class claims that seek significant awards of compensatory and punitive damages is a misapplication of Rule 23(b)(2) that denies both Home Depot and absent class members important constitutional and procedural protections.[6] In particular, the Due Process Clause confers the right to opt out of a class action "seeking to bind known plaintiffs concerning claims wholly or predominantly for money judgments." *Phillips Petroleum Company v. Shutts*, 472 U.S. 797, 811 n.3 (1985). At a minimum, therefore, the Court should hold this petition pending its resolution of the *Adams* case.

Indeed, Home Depot respectfully suggests that this case is a better vehicle than *Adams* because it permits this Court to consider both the constitutional issue raised in *Ticor Title* and *Adams*, and whether Federal Rule 23 can be interpreted to avoid

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[6] Home Depot has standing to raise the due process rights of absent class members. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985).

that constitutional difficulty. Because this case arises under the Federal Rules of Civil Procedure, it permits the Court either to address the due process issue directly or to consider whether it should interpret Federal Civil Rule 23 in a manner that avoids the necessity of resolving the constitutional question. The latter alternative, of course, is not open in *Adams*, which arose under Alabama Civil Rule 23, because this Court does not have any authority to construe provisions of state law. Nonetheless, because many States, including Alabama, look to Federal Rule 23 and this Court's interpretations of the federal rule for guidance, the constitutional issue being considered by the Court in *Adams* might be rendered entirely hypothetical if Federal Rule 23 is interpreted to forbid certifications like the one at issue in *Adams*. Home Depot, therefore, urges the Court to consider carefully the advantages of granting this petition and dismissing the petition in *Adams* as improvidently granted. As an alternative, the Court could grant this petition and decide this case in tandem with *Adams* during this Term. At an absolute minimum, this Court should hold this petition until the Court has resolved the *Adams* case.

To explain the posture of these issues more fully, some brief background is in order. In *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), dissatisfied members of a Rule 23(b)(2) class collaterally attacked the class certification order on due process grounds after failing to convince the Third Circuit on direct appeal that the class was improperly certified under Federal Rule 23(b)(2). The Ninth Circuit held that the Due Process Clause requires class members to have the opportunity to opt out of the class-action suit with regard to their claims for monetary damages. *Id.* at 392. Accordingly, while leaving intact the injunctive aspects of the original Rule 23(b)(2) class action, the court excused the dissatisfied class members from the preclusive effect of the class action with respect to their monetary claims and allowed them to pursue those claims anew. This Court granted certiorari to review the due process issues raised by the Ninth Circuit's ruling. *Ticor Title Ins. Co. v. Brown*, 510 U.S. 810 (1993).

After full briefing and oral argument on the due process

issue, the Court dismissed the writ as improvidently granted because the procedural posture of *Ticor Title* did not allow the Court the option of interpreting Federal Rule 23 to avoid the constitutional issue. *See Ticor Title Ins. Co. v. Brown*, 114 S. Ct. 1359, 1362 (1994) (*per curiam*). The propriety of the original certification order under Rule 23(b)(2) was *res judicata*, and therefore the Court could not avoid the due process question by interpreting Rule 23 to require that class actions involving significant claims for monetary damages be certified under Rule 23(b)(3), which contains an opt-out provision, rather than under (b)(2), which does not. The Court indicated that there was "at least a substantial possibility" that Rule 23 could be interpreted in such a manner, which would avoid the necessity of deciding the constitutional question at all. 114 S.Ct. at 1361.

The Court has now underscored the importance of the constitutional issue by granting the petition in the *Adams* case. In *Adams*, however, the constitutional issue arises against the backdrop of a binding interpretation of Alabama Civil Rule 23 by the Alabama state courts, which squarely necessitates resolution of the constitutional issue. This case, by contrast, affords the Court the opportunity to consider *both* the constitutional question that the Court has found sufficiently compelling to grant certiorari twice already, *and* the threshold interpretive issue posed under Federal Civil Rule 23, which a majority of the Court thought so substantial that it took the unusual step of dismissing the petition in *Ticor Title* without resolving the constitutional issue on which it had granted certiorari. Unlike *Ticor Title*, this case is a direct -- as opposed to a collateral -- attack on the District Court's certification of a class under Federal Rule 23(b)(2). As a result, the Rule 23 issue is not *res judicata* -- both the nonconstitutional and constitutional issues are properly before this Court. Hence, the Court is free to decide either that the Due Process Clause requires class members to have an opportunity to opt out in a suit involving substantial monetary damages, or that Federal Rule 23 should be construed to avoid any constitutional problem by clarifying that such a suit cannot be certified as a

class action under Rule 23(b)(2).[7]

As the Court explicitly recognized in *Ticor Title*, this nonconstitutional issue is substantial. The certification of class actions seeking monetary damages under Rule 23(b)(2) fundamentally distorts the procedural scheme embodied in Rule 23. The provisions of Rule 23 have been carefully drafted to promote the efficient resolution of common claims while protecting the rights and interests of both the class plaintiffs and defendants. Unlike subsection (b)(3), subsection (b)(2) of the Rule does not provide for an opt-out right or any other check to ensure that common issues predominate and that the class action vehicle is a superior means of resolving the individual claims.

The absence of these protections is understandable when the class action is limited to injunctive relief, because in that situation such protections are wholly unnecessary. If injunctive relief truly affects all members of a defined class equally, then all members of the class will enjoy the benefits of the injunction even if some of them are excluded from the class. In those circumstances, an opt-out right would be superfluous. *See, e.g.*, 5 H. Newberg, *Newberg on Class Actions* § 24.81 at 24-264 (3d ed. 1992). By the same token, a finding that the defendant has acted in a way that can be remedied by "injunctive relief or corresponding declaratory relief with respect to the class as a whole," Fed R. Civ. P. 23(b)(2), also obviates the need for the "predominance" and "superiority" checks of Rule 23(b)(3). It is hard to imagine how a case could satisfy this criterion unless common issues do predominate and a class action is the

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[7] In short, to avoid the problem encountered in *Ticor Title*, the Court must grant certiorari in a case, like this one, which is on direct review. The due process issue can only arise in two contexts: on direct review of a class certification order under Rule 23(b)(2), or as a collateral attack on such an order by dissatisfied class members. In *Ticor Title*, the Court fully explained the shortcomings of resolving the due process issue on collateral review; the only remaining avenue for addressing this important question is in a case like this one.

superior mechanism for resolving the litigation. By contrast, if claims for monetary damages are smuggled into a Rule 23(b)(2) class action, then the opt-out right is wiped out and no substitute for the necessary checks of Rule 23(b)(3) is provided, thus eliminating all of the procedural protections ordinarily afforded under Rule 23.

The trial court in this case did not avoid these problems by purporting to defer consideration of how individual damage cases would be tried. To be sure, the District Court certified an "injunctive class" under Rule 23(b)(2) to address "liability and relief applicable to the class as a whole," as well as "whether defendant is liable for punitive damages," and then put off making any determinations about issues of "individual compensatory and equitable relief" until an unspecified future point, if at all. App. 12a. But this will not do. If only some (heretofore unspecified) claim for injunctive relief is appropriate for class treatment, then that claim is all that can be properly certified for class treatment. The court cannot hold hostage all the class members and their damage claims, as well as the defendant, until some future point when the court will make up its mind. This mischievous two-step eviscerates the up-front protections of Rule 23, which were consciously designed to prevent certification of unmanageable or inappropriate classes. If left unchecked, this approach will continue to have a pernicious influence on other courts. This case, therefore, provides a particularly appropriate vehicle for the Court to clarify the proper and limited scope of class certifications under Federal Rule 23(b)(2).

Resolution of *both* the interpretive *and* the constitutional issues raised in this petition is therefore of critical importance as a matter of judicial administration for the federal trial courts. The Court's decision to dismiss the petition in *Ticor Title* left unresolved these important threshold issues concerning the propriety of certifying a class seeking substantial monetary damages under Rule 23 (b)(2). The Court's decision to grant certiorari in *Adams* reinforces the importance of the constitutional issue. But the question concerning the proper interpretation of Federal Civil Rule 23 -- which may make

resolution of the constitutional question unnecessary at least with respect to the federal courts and state courts that follow this Court's interpretation of the federal rule -- will inevitably remain unresolved after the *Adams* case is decided. In *Ticor Title*, this Court expressed a sound preference to defer the due process issue for resolution in a case that would permit it to consider the relative merits of resolving the issue either by interpreting Rule 23 to avoid any constitutional problem or by deciding the due process question directly. This petition provides that opportunity. The *Adams* case does not. As a consequence, this Court should dismiss the petition in *Adams* as improvidently granted and grant this petition. In the alternative, the Court should grant this case and decide it in tandem with *Adams* during this term. At a minimum, however, this Court certainly should hold this petition pending the decision in *Adams*.

III. THIS PETITION PROVIDES AN APPROPRIATE VEHICLE FOR RESOLVING THESE IMPORTANT ISSUES.

The fact that this case comes to the Court after denial of a petition for mandamus below should not deter the Court from granting certiorari. Although in some areas of the law this procedural posture might give rise to some prudential hesitation about whether this Court should grant review, that is emphatically not the case with respect to issues relating to class certification orders, especially when Seventh Amendment rights are at stake.

In the first place, it is at the mandamus stage that disputes over the propriety of class certification are most crisply presented. For this reason, a host of circuit courts recently have addressed important issues relating to class certification at an interlocutory stage. *See, e.g., Valentino v. Carter-Wallace*, 97 F.3d 1227 (9th Cir. 1996) (reviewing certification order under 28 U.S.C. § 1292(b)); *In re American Medical Sys.*, 75 F.2d 1069 (6th Cir. 1996) (granting petition for mandamus); *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996)

(reviewing certification order under 28 U.S.C. § 1292(b)); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995) (granting petition for mandamus).

Indeed, the reality is that these important cases and issues *must* be reviewed on mandamus or interlocutory review if they are to be reviewed at all. The pressure to settle a case in the wake of an unsuccessful effort to resist class certification is overwhelming. Indeed, plaintiffs' attorneys and certifying courts seem to count on the fact that these cases will settle once they are forced into that posture. The Seventh Circuit expressly acknowledged this reality in *Rhone-Poulenc*: "The reason that an appeal will come too late to provide effective relief for these defendants," the court reasoned, "is the sheer magnitude of the risk to which the class action, as opposed to the individual actions pending or likely, exposes them." 51 F.3d at 1297. That risk creates an "intense pressure to settle." *Id.* at 1298. And "[i]f they settle, the class certification -- the ruling that will have forced them to settle -- will never be reviewed." *Id. Castano* likewise acknowledged that "class certification creates insurmountable pressure to settle, whereas individual trials would not." 84 F.3d at 746. This is true without regard to the ultimate likelihood of success on the merits: "The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low." *Id.* Accordingly, with respect to the important issues raised in this petition, review by this Court, if it is to come at all, must come from a case in an interlocutory posture.

In addition, there should be no hesitation to accept this case in an interlocutory posture in light of the important Seventh Amendment rights at stake. "The protection of the right conferred by the Seventh Amendment to trial by jury in federal civil cases is a traditional office of the writ of mandamus." *Rhone-Poulenc*, 51 F.3d at 1303. This Court has not hesitated to grant certiorari at an interlocutory stage when such rights are at issue. *See, e.g., Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 472 (1962); *Beacon Theatres v. Westover*, 359 U.S. 500, 510-

11 (1959).[8]

Finally, the unusual procedure employed by the Ninth Circuit in this case puts a premium on the thorough consideration of this petition. Not only did the appellate panel give short shrift to the arguments raised in Home Depot's mandamus petition, but the panel took the unusual step of barring Home Depot from filing a motion for reconsideration of the panel decision to the *en banc* court. While such truncated review would be a cause for concern with respect to any petition, the panel's aggressive moves to preclude any further judicial review are particularly troubling in a case like this one, in which the petition for rehearing *en banc* attempted to inform the full court of a disagreement between the panel and a decision rendered by another circuit. Although the Federal Rules of Appellate Procedure permit the circuit courts to deviate from the general practice of permitting petitions for rehearing *en banc*, on the rare occasions when a circuit court takes such an unusual step, it is incumbent upon this Court to give the ensuing petition for certiorari full consideration.

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[8] Review of this case would also be consistent with the Court's historical use of mandamus "as a means of policing compliance with the procedural rules" in civil cases. *Will v. United States*, 389 U.S. 90, 100 n.10 (1967); *accord LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957) (mandamus proper to remedy District Court's abuse of discretion in appointing master); *Schlagenhauf v. Holder*, 379 U.S. 104, 111 (1964) (mandamus appropriate where District Court exceeded power under Fed. R. Civ. P. 35 in ordering physical exam).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted or, in the alternative, this petition should be held pending the Court's resolution of *Adams v. Robertson*, No. 95-1873.

Respectfully submitted,

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December 12, 1996

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED SEPTEMBER 13, 1996

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-70495

DC#CV-94-4335-SYI
Northern California

HOME DEPOT USA, INC.,

Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,

Respondent,

and

VICKI BUTLER, et al.,

Real Parties In Interest.

ORDER

Before: FLETCHER, BRUNETTI and NOONAN, Circuit Judges

The motions filed by Home Depot, USA, Inc. for leave to file additional case authority and denied.

Appendix A

The motion filed by California Employment Law Council and Lawyers for Civil Justice for leave to file an amici curiae brief is denied.

Petitioner has not demonstrated that this case warrants the intervention of this court by means of the extraordinary remedy of mandamus. *See Bauman v. United States District Court,* 557 F.2d 650 (9th Cir. 1977). Accordingly, the petition is denied.

No motions for reconsideration, rehearing, clarification, stay of the mandate, or any other submissions shall be filed or entertained in this closed docket.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA FILED MAY 30, 1996

IN THE UNITED STATES COURT DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-94-4335 SI
C-95-2182 SI

VICKI BUTLER, et al.,

Plaintiffs,

v.

HOME DEPOT, INC.,

Defendant.

TERESA FRANK, KATHERINE TOMA, and KATHLEEN YORK, et al.

Plaintiffs,

v.

HOME DEPOT, INC.

Defendant.

ORDER:

(1) **DENYING MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL (28 U.S.C. § 1292 (b));**

Appendix B

(2) SETTING SCHEDULE;
(3) REGULATING COMMUNICATIONS WITH CLASS MEMBERS; AND
(4) DIRECTING FORM OF NOTICE

1. DENIAL OF MOTION TO CERTIFY ORDER FOR INTERLOCUTORY APPEAL

On March 29, 1996, the Court heard argument on the defendant Home Depot's motion for certification for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Having considered the arguments of counsel and the papers submitted, including the recently-submitted opinions concerning tort claims in the tobacco litigation, the Court DENIES Home Depot's motion. The Court does not find that the exceptional circumstances required by 28 U.S.C. § 1292(b) are present here.

2. PRELIMINARY PRETRIAL AND SCHEDULING ORDERS

On May 17, 1996, the Court heard argument on the defendant Home Depot's motion to communicate *ex parte* with certain class members; the parties' motions regarding the proper form of notice, if any, the should be mailed to Home Depot's female employees; the parties' motions concerning the scope and content of the first and second phases of this case; Home Depot's motion to depose the 64 class members who filed declarations in support of the plaintiffs' motion for class certification; and the parties' motions regarding pre-trial and trial scheduling.

Appendix B

A. Communication With Class Members and Class Notice

The class in this case consists of females who are present or former Home Depot employees in various job positions. Home Depot requests permission to communicate about this litigation, *ex parte*, with its current female employees, in order that it can conveniently prepare its defense. Plaintiffs object, pointing out that the female Home Depot employees are, on account of the class certification, clients of plaintiffs', counsel; thus, they argue, the rules of professional conduct which govern counsel preclude such *ex parte* communication.[1]

All class members are clients of plaintiffs' class counsel. However, Home Depot's current officers, directors and managing agents (in this case including department supervisors, assistant store managers and store managers) are clients of Home Depot's counsel.[2] Some current female employees fall into both categories, and it is to those employees that the motions are directed.

In addition, given the close relationship between class members and defendant in this case, it has been agreed that formal written notice should be presented to the class, informing them of the status of this matter.

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[1] *See* Rule 2-100, California Rules of Professional Conduct, Business & Professions Code §§ 6076, 6077.

[2] Former female employees, whether management lever or otherwise, may be class members but are not clients of Home Depot's counsel and thus are not available for defendants *ex parte* communications pursuant to this order.

Appendix B

The parties have submitted competing versions of a proposed class notice and of an order regulating class communications; they appear unable to agree among themselves as to format. The Court has therefore issued the attached orders dealing with these issues. The content of the notice and the limits of communication may be altered only by stipulation of all parties.

B. Separate Trials for Jury and Nonjury Issues

Home Depot urges that Stage I of this action should be bifurcated, such that the Court would hear the statistical evidence relating to disparate impact and make its determinations with respect to plaintiffs' claim for equitable relief before the jury is empaneled. The Court DENIES Home Depot's request. Nothing in the Civil Rights Act of 1991, 42 U.S.C. § 1981a, mandates separate trials of jury and nonjury issues, and such a procedure would unnecessarily lengthen this case. Much of the evidence which would be offered to the Court on the disparate impact theory will also be provided to the jury in connection with the disparate treatment theory. any determinations which must be made prior to trial pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786, 2795 (1993) can be handled without the necessity of conducting two full-fledged trials of the statistical material.[3]

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[3] It is not clear how applicable *Daubert* will be to the evidence in this case, which will presumably consist largely of statistical evaluations. Different experts may well draw different conclusions from the same underlying data, but the use statistical tools in the employment context can hardly be characterized as "novel" or "experimental." *Id.* 2792.

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C. Claims of Named Class Representatives

The parties requested clarification regarding whether the individual damage claims of the class representatives will be tried during Stage I or Stage II. As stated by this Court in the January 25, 1996 order certifying this action for class treatment, the individual claims for compensatory damages, and other particularized individual relief, will be litigated in Stage II. The first stage of this lawsuit will adjudicate the claims that pertain to the class as a whole — injunctive, declaratory and, if intentional discrimination is found by the jury, entitlement to punitive damages. Testimony by individual employees in Stage I would be for illustrative purposes, either to support or to rebut plaintiffs' class-wide contentions; but individual claims of individual employees, including the class representatives, will be resolve during Stage II.

D. Depositions of Declarants re Class Certification

Home Depot argues that it should be allowed to depose the 64 individual class members who provided sworn declarations in support of class certification in this case. Home Depot urges that it needs these depositions not only for cross-examination purposes, should plaintiffs call these women as "anecdotal" witnesses at Stage I of the trial, but also to enable Home Depot to decide whether it will call some of the women as witnesses. Plaintiffs oppose the request, on the grounds that these are absent, not representative, class members and that since there are 64 of them, such depositions would be burdensome and unduly time-consuming.[4]

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[4] Plaintiffs also suggest that defendant is engaged in a fishing expedition whose unarticulated goal is to re-litigate the propriety of class-certification. Counsel for Home Depot stated on the record that taking the depositions of these women is for the sole purposes stated above, not to revisit this Court's typically finding in its January 25, 1996 Order certifying the class.

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Home Depot's request is GRANTED, but with the following limitions: First, the subject matter of the depositions must be limited to the testimony given by the women in their declarations. Second, these depositions may be no more than four hours in length per individual declarant.

E. Further Pretrial Scheduling

The parties have been unable to agree upon a proposed schedule for pretrial and trial of this case. Therefore, the action shall proceed according to the following schedule, with the caveat that all Court dates are subject to change based upon the Court's calendar:

September 27, 1996:	Parties to exchange list of anticipated Stage I trial witness (including "anecdotal" witnesses);
February 28, 1997:	Identification of expert witnesses and exchange of Stage I experts' reports;
April 4, 1997:	Stage I lay witness discovery cutoff;

April 25, 1997: Stage I expert discovery cutoff;

May 23, 1997: Last date for filing any *Daubert* motion;

June 20, 1997: Last date for filing any summary judgement motions;

August 22, 1997:	Stage I motions in limine due; Stage I trial briefs due; parties to exchange final lists of Stage I trial witnesses (except rebuttal witnesses); parties to exchange lists of Stage I trial exhibits (except any rebuttal or impeachment exhibits);
September 2, 1997:	Stage I pretrial conference and argument re: motions in limine;
September 22, 1997:	Stage I trial begins[5]; the length of trial will be set by the Court at a later time.

F. Other Issues

The parties agreed to meet and confer on the issue of potential discovery masters, and to submit to the Court a list of mutually agreeable discovery masters. No names have been received to date; if no names are submitted by June 7, 1996, the Court will appoint a discovery master without further input from the parties.

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[5] Subject to change based upon the Court's criminal and trial calendar.

Appendix B

IT IS SO ORDERED.

Dated: May 29, 1996

s/ Susan Illston
SUSAN ILLSTON
United States

District Court

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA FILED JANUARY 25, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-94-4335 SI

VICKI BUTLER, et al.,

Plaintiffs,

v.

HOME DEPOT, INC.,

Defendant.

ORDER CERTIFYING CLASS ACTION

On August 30, 1995, the Court heard argument on the plaintiffs' motion for class certification. On September 8, 1995; September 11, 1995; September 18, 1995; October 11, 1995; December 5, 1995; and December 6, 1995; the parties filed supplemental briefing and authorities. Having considered the arguments of counsel and the papers submitted, the Court hereby GRANTS the plaintiffs' motion for class certification and adopts the following class definition:

> A. All female employees of Home Depot within the geographical area of Home Depot's West Coast Division who are or were employed on or after November 5, 1992, or who are or will be employed between this date and the date of entry of judgement in this class action: and

B. All female applicants who applied for employment in Home Depot stores within the geographical area of Home Depot's West Coast Division on or after November 5, 1992 and were qualified for employment in the positions of salespersons or assistant managers and who were not hired or were hired for cashier or other operations positions.

The Court further orders that this litigation be bifurcated into separate phases. The first phase will address liability and relief applicable to the class as a whole, including declaratory and injunctive relief, and whether defendant is liable for punitive damages. This phase of the action is certified under FRCP 23(b)(2). If liability is established, the second phase of this case will address appropriate individual compensatory and equitable relief, including individual entitlement to back and front pay. The precise procedures to be used during the second phase, if any, will be determined later in this litigation.

BACKGROUND

This action arises under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and the California Fair Employment and Housing Act, Government Code §§ 12940 *et seq.* (FEHA). The complaint in this action was filed on December 12, 1994. Plaintiffs Vicki Butler, Susan Ellis, Felicia Funderburk, Jacqueline Genero, Sheryle Jones, Kimberly Stoddard, and Cheryl Williams allege violations of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C., § 20003 *et seq.*, and allege gender discrimination practices against female employees and applicants throughout Home Depot's West Coast Division (hereafter "WCD").

Appendix C

A. *Factual Background*

Plaintiffs allege that Home Depot discriminates based upon gender in nearly all aspects of its personnel decision-making, including: (1) hiring and patterns of gender-based segregation of jobs segregation and departments in initial job placement; (2) training; (3) transfer opportunities to merchandizing positions; (4) promotional opportunities to supervisorial and management of positions; and (5) compensation.

First, plaintiffs allege that the defendant's system of hiring, job assignment, training, promotions, and compensation is entirely subjective. They allege that there are no specific, entirely subjective. They allege that there are no specific, objective hiring criteria, nor are there objective criteria used to set pay levels, and that local gender biased male managers are therefore left broad discretion to make decisions that have an adverse affect upon women. Second, plaintiffs present statistical evidence of the low number of women in sales, merchandizing, managerial and supervisorial positions, and the high number of men in these positions; and of the high number of women in cashier and other operations positions, and the corresponding low number of men in these same positions. This statistical evidence, upon which plaintiffs rely heavily, suggests a high level of segregation by gender. Plaintiffs contend that this is particularly significant, given that Home Depot is a store that promotes from within, provides on the job training, and has no minimum qualifications for entry level jobs.

In support of their motion, plaintiffs have submitted the following materials: (1) the declarations of 55 members of the proposed class and of 8 other witnesses detailing incidents of

gender discrimination in connection with hiring, job assignments, training, promotions and compensation; (2) the EEOC charges of 10 members of the proposed class; (3) Home Depot's standardized personnel forms, procedures and training materials; (4) excerpts from the depositions of 10 Home Depot managers, and (5) the declaration of plaintiffs' expert, Professor William T. Bielby.

In opposition to the motion, defendant filed: (1) declarations of 30 witnesses who are or were employees of Home Depot; (2) various charts and compilations concerning plaintiffs' employment history; (3) declarations of two experts' and (4) excerpts from the depositions of class representatives.

B. *Legal Standard for Class Certification*

As a threshold to class certification. Rule 23(a) of the Federal Rules of Civil Procedure requires a showing of the following: (1) that the class is so numerous that joinder of all members is impracticable; (2) that there are common questions of law or fact; (3) that the representatives parties; claims or defenses are typical of the class claims or defenses; and (4) that the representative parties will fairly and adequately protect the class interests. The party moving for class certification bears the burden of showing that the 23(a) requirements are satisfied. *General Tel. Co. of Southwest v. Falcon,* 457 U.S. 147, 156, 102 S.Ct. 2364, 2370 (1982).

In addition to demonstrating that the Rule 23(a) requirements are met, the plaintiffs must establish one or more of the following grounds for maintaining the suit as a class action pursuant to F.R. Civ.P. 23(b): (1) that there is a risk of substantial prejudice from separate action; (2) that declaratory

or injunctive relief benefitting the class as a whole would be appropriate; or (3) that common questions of law or fact predominate and the class action is superior to other available methods of adjudication.

DISCUSSION

A. *Rule 23(a) Requirements*

1. Rule 23(a)(1) — Numerosity

Rule 23(a)(1) requires that the class be so numerous that the number of potential plaintiffs cannot be practicably joined. Whether joinder would be impracticable depends on the facts and circumstances of each case, and does not require any specific minimum number of class members. In the present case, it is undisputed that the proposed class numbers in the thousands. The Numerosity requirement is easily met.

2. Rule 23(a)(2) — Common Questions of Law or Fact

The requirement in Rule 23(a)(2) that there be questions of law or fact common to the class is satisfied by "the alleged existence of common discriminatory practices." The defendant's actions need not affect each class member in the same manner. *Arnold v. United Artists Theater Circuit, Inc.*, 158 F.R.D. 439, 448 (N.D. Cal. 1994)(citation omitted).

The Court finds that plaintiffs have satisfied the commonality requirement by their challenge to defendant's uniform personnel policies under Title VII. Common issues include whether the plaintiffs can sustain their burden of proof under either the disparate treatment (intentional acts of

discrimination), or the disparate impact (not necessarily intentional) theories as to Home Depot's subjective employment practices. *See Jauregui v. Glendale,* 852 F.2d 1128, 1135-36 (9th Cir. 1988); *Gay v. Waiters' and Dairy Lunchmen's Union,* 696 F.2d 531, 534 (9th Cir. 1982). In addition, the evidence upon which plaintiffs' propose to rely — statistical evidence of widespread discrimination — is common to the class as a whole. *See Int'l Broth, of Teamsters v. United States*, 431 U.S. 324, 339-40 (1977); *EEOC v. General Tel. Co.,* 885 F.2d 575, 579-82 (9th Cir. 1989) *cert. denied*, 11 S.Ct. 370 (1990). The inferences drawn from this evidence will be common to all class members and will raise common questions of law.

3. *Rule 23(a)(3) — Typicality*

In addition, the Court finds that the representative plaintiffs' claims are typical of the claims of the class. Plaintiffs contend that defendant maintains a personnel system characterize by the use of subjective criteria by male management with hostile and stereotypical attitudes toward women. Plaintiffs further allege that they were discriminated against with respect to initial job placement, equal pay, and denial of training and promotional opportunities. These class claims are the same claims raised by the class representatives, and the declarations filed in support of this motion demonstrate their typicality. The individual plaintiffs' claims depend upon proof of the same discriminatory employment practices complained of by and on behalf of the class members. Defendant's argument that these plaintiffs' claims are not typical is unpersuasive.

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4. *Rule 23(a)(4) — Adequacy of Representation*

Adequacy of representation under Rule 23(a)(4) involves the satisfaction of two elements: 1) that the representative party's attorney be qualified, experienced and generally able to conduct the litigation; and 2) that the suit not be collusive and that the representative plaintiffs' interest not be antagonistic to those of the remainder of the class. *Harriss v. Pan American World Airways,* 15 FEP Cases at 1649.

The first element of the adequacy requirement is easily satisfied by the competence and experience in handling complex class action lawsuits of the firms representing plaintiffs.

With respect to the second element, defendant objects to the inclusion of applicants in the class contending that applicants have different and "antagonistic" interests from employed class members since they are all competing "to get into the same sales and management positions." (Def. Br. at 5-6). Defendant also argues that no named representative is an applicant, because plaintiffs' former applicant representative, Wilson, is time-barred. Defendant further argues that the presence of both supervisory and non-supervisory personnel in the proposed class precludes certification.

Plaintiffs concede that Wilson has been removed as a class representative, but argue that the absence of an applicant representative does not preclude class certification. Plaintiff cites several cases in which courts reversed decertification of classes comprised of both employees and applicants. *See Watson v. Fort Worth Bank & Trust,* 798 F.2d 791, 795-6 (5th Cir. 1986), *vac'd and remanded on other grounds,* 487 U.S. 977

(1988) (reversing decertification of a class combining applicants and employees, stating that proof that an employer acted under a policy of discrimination could support certification of a class comprised of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general way, such as through subjective decisionmaking). Furthermore, plaintiffs argue that the Court may permit counsel to designate an appropriate employee member of the class to serve as an applicant representative.

Plaintiffs are correct that classes comprising both employees and applicants can be certified together. *General Telephone v. Falcon*, 457 U.S. at 159 n.15 (1982). Courts have routinely found that allegations that an employer operated under a general policy of discrimination can justify a class comprised of a diverse set of individuals. *Neal v. Moore (*D.D.C. No. 93-2420 (1994), Mem. Op. at 22), citing *Richardson v. Byrd,* 709 F.2d 1016, 1020 (5th Cir. 1983) (job assignment policy affected both employees and applicants). Some courts have concluded that "subjective decision-making" infected a company's employment practices as a whole, such that a broadly defined class is warranted. *Neal v. Moore* at 22, citing, *Brown v. Eckerd Drugs, Inc.*, 564 F.Supp. 1440, 1446 (W.D.N.C. 1983).

Moreover, as will be discussed in further detail below, any potential problems inherent in the fact that the proposed class in the present case is comprised of a diverse group of plaintiffs can be remedied by bifurcation of the case into a liability phase (addressing issues common to the class such as injunctive relief) and a remedial phase (addressing the individual compensatory damage claims). *See eg., Int'l Brotherhood of*

Teamsters v. United States, 431 U.S. 324 (1977). If there is a second, remedial phase of this case, supervisors and non-supervisors will all be able to come forward with evidence of their own specific claims for relief. During the first, liability phase, by contrast, the diversity of class membership will not present material conflicts.[1]

Accordingly, this Court finds that the interests of the representative plaintiffs are not antagonistic to the remainder of the class; and that plaintiffs have met their burden of proving adequacy of representation, both of counsel and of the class representatives.

B. *Rule 23(b) Requirements*

Once the four requirements of 23(a) have been met, the Court must determine whether the case meets any of the three requirements of Rule 23(b). Plaintiffs argue that this class should be certified under 23(b)(2), which provides in pertinent part:

> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> * * *

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[1] One Court has commented that "an injunction against a few supervisory members of the class — who most likely did not exert significant influence over departmental policy-making — is fairly characterized as *de minimus* relative to the value of such an injunction in protecting these same supervisors from epidemic discrimination." *Neal v. Moore* (D.D.C. No. 93-2420 (1994) Mem. Op. at 27)).

> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . .

Defendants argue that class certification under this subdivision is improper because the damages issues in this case predominate and "overwhelm" the requests for injunctive and declaratory relief.

In making this argument, defendant relies upon *McDonnell Douglas Corp. v. U.S. Dist. Ct., C.D. of Cal.*, 523 F.2d 1083, 1087 (9th Cir. 1975). The facts of the cases cited by defendant are completely inapposite. In *McDonnell Douglas*, a wrongful death action for damages resulting from an airplane crash, the Ninth Circuit found that the plaintiffs' claims for declaratory relief "added nothing to [plaintiffs'] claim for damages." In the present case, plaintiffs' claims for damages are secondary to their primary claim for injunctive relief to prohibit gender biased employment practices. The fact that plaintiffs seek damages in addition to declaratory and injunctive relief does not preclude certification under Rule 23(b)(2). *Probe v. State Teachers' Retirement System,* 780 F.2d 776, 780 (9th Cir. 1986). It is "well established . . . that employment discrimination suits involving such individual-specific awards of lost back pay may be maintained as (b)(2) class actions . . . ." *Arnold v. United Artists Theater Circuit, Inc.,* 158 F.R.D. 439, 453, citing, *Probe*, 780 F.2d at 780.[2]

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[2] Defendant also points to *Celestine v. Citgo Petroleum Corp., et al.*, Case No. 93-0864 (W.D. La.), in which Magistrate Judge Wilson's

(continued...)

Appendix C

Plaintiffs' allegations that the defendant maintains a policy and practice of denying women equal employment opportunities is sufficient to satisfy the Rule 23(b)(2) requirement. Defendant's arguments that the damage claims "overwhelm" the claims for injunctive relief are conclusory and, at this early stage, speculative. Accordingly, the Court finds that the first, liability phase of this case is appropriate for certification under Rule 23(b)(2).

C. *Bifurcation*

At oral argument, the Court requested supplemental briefing on whether this case could proceed in phases, and what, if any, constitutional limitations might affect such a process.[3]

In response to this request, plaintiffs have pointed to numerous cases, many of which are from the Northern District of California, indicating that the courts have routinely certified classes in similar employment discrimination cases by separating the trials into two phases. In Phase I, class wide damages and injunctive relief are determined. In Phase II — which the Court could certify now, or postpone until a later date

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[2] (...continued)
recommendation (filed 8/7/95) against class certification was adopted by the district court (9/11/95). This Court finds the analysis in that case inconsistent with controlling Ninth Circuit precedent and with other class action employment cases decided in this district. *See, e.g., Probe, supra, Perefield v. Chevron, supra; Arnold v. United Artists, supra.*

[3] Specifically, the Court requested briefing on the effect, if any, of the enactment of the Civil Rights Act of 1991 (amending Title VII to add claims for compensatory and punitive damages for intentional discrimination, and a right to jury trial), and the Seventh Amendment implications if this case were to be tried in separate phases before separate juries.

— the individual compensatory damages issues would be resolved. In *Arnold v. United Artists Theater Circuit, Inc.*, 158 F.R.D. 439 (N.D. Cal. 1994), Chief Judge Henderson addressed bifurcation of employment discrimination cases, and made the following general observations:

> According to the authors of the leading treatise on class actions, most courts adjudicating civil rights class action sin the employment discrimination context opt to bifurcate the liability and damages phases of the trial. 5 H. Newberg, *Class Actions* § 24.123 at 24-414-416 (3d ed. 1992). *See e.g., Teamsters v. United States,* 431 U.S. 324, 360-362, 97 S. Ct. 1843, 1867-68, 52 L.Ed.2d 395 (1977); *Harriss v. Pan American World Airways, Inc.*, 74 F.R.D. 24 (N.D.Cal. 1977); *Barefield v. Chevron,* 1988 WL 188433, 1988 U.S. Dist. LEXIS 15816, 48 Fair Empl. Cas. (BNA) 907 (N.D. Cal. 1988).

158 F.R.D. at 458-459. *See also Barefield v. Chevron,* 48 Fair Empl. Prac. Cas. (BNA) 907 (N.D. Cal. 1988).

Similarly, in *Stender v. Lucky Stores, Inc.*, N.D. Cal. No. C-88-1467 (MHP), Judge Patel bifurcated a class action employment discrimination case into two separate phases. The first phase of the trial addressed class liability and liability for punitive damages. The claims of the individual plaintiffs for damages were deferred to later proceedings.[4]

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[4] The case settled after Judge Patel issued Findings of Fact and Conclusions of Law; the court never held the second phase of the trial.

Appendix C

Defendant argues that bifurcation of liability and damages would violate its Seventh Amendment right to a fair trial, because different juries would be deciding essentially the same issues. *In re Innotron Diagnostics,* 800 F.2d 1077, 1986 (Fed. Cir. 1986). Defendant argues that whether each individual plaintiff "can establish liability and the measure of compensatory and punitive damages" would have to be considered again in the second phase of the trial.

This Court is not persuaded by these arguments. Courts have routinely adopted the approach advocated by plaintiffs in which the first phase of the proceedings focuses exclusively on classwide claims, e.g., whether a defendant has in fact engaged in discriminatory employment practices. A jury verdict in favor of plaintiffs at this phase would result in injustice and declaratory relief, and possibly, punitive damages. Individual compensatory damages would be resolved in the second phase of the proceedings which, since they would adjudicate individual claims, would not involve the "same issues" as did the first phase. As evidenced by the numerous cases across the country that have addressed this issue, the Seventh Amendment does not mandate that all phases of the litigation be heard by the same jury.

This Court will defer ruling on class certification with respect to the second phase of this trial. At such a time as it becomes necessary, the Court will adopt an approach that the Court and the parties can agree will best protect the rights of absent class members and defendant, in adjudicating the remaining issues.

Appendix C

D. *Other Issues*

The scope and starting and ending dates of the class are disputed by the parties. Defendant argues that the class is too broad, in that it encompasses those who might suffer some injury in the future. Plaintiffs have framed the class to include claims which arise between the class opening date, and the date of the entry of judgment in this action. In this respect, the Court does not find the class definition to be overly broad.

Defendants also argue that the named representatives are time-barred under Title VII and FEHA. With respect to the Title VII plaintiffs, the earliest filed charge is that of Kim Stoddard, who filed an EEOC and DFEH charge on November 5, 1993. Thus any claims that arose prior to January 9, 1993 (300 days prior to the November 5 date) must be excluded from the action.

With respect to the FEHA claims, defendant argues that the earliest proper DFEH claim was made on August 25, 1994 (by Funderburk) and thus any claims arising out of actions which occurred prior to August 25, 1993 (one year prior to the August 25 date) must be excluded. Defendant argues that plaintiff Stoddard's November 5, 1993 DFEH charge should be treated as ineffective, because Stoddard's lawsuit was not filed within one year after the DFEH issued her right to sue letter. Plaintiffs disagree, claiming that the class opening date for FEHA claims should be November 5, 1992 (one year prior to the date of Kim Stoddard's DFEH filing), and that Stoddard's claim is not timebarred because the statute of limitations for filing a complaint under FEHA may be equitable tolled during the pendency of an EEOC investigation. *EEOC v. Farmers Bros. Co.*, 31 F.3d 891 (9th Cir. 1994); *See also Salgado v. Atlantic Richfield Co.*, 823 F.2d 1322, 1326 (9th Cir. 1987). Plaintiffs argue that since the

EEOC was investigating Stoddard's claim until it issued her right-to-sue letter on September 22, 1994, Kim Stoddard's FEHA claim filed three months later was timely. This Court agrees. Accordingly, the class opening date for the Title VII issues as to all ten states in the WCD will be January 9, 1993. The class opening date for the FEHA claims in California will be November 5, 1992.

Finally, a related case — *Frank v. Home Depot, Inc.*, No. C-95-2182SI — has been filed against the same defendant with allegations that are almost identical to those in *Butler*. Plaintiffs have requested consolidation of these cases. Defendant points out that this motion was previously denied.[5] However, consolidation was denied before because adding new plaintiffs at that time would have necessitated modification of the briefing and discovery schedules with respect to the pending motion for class certification. In light of this Court's decision to grant plaintiffs' motion for class certification, these concerns are moot. Accordingly, the plaintiffs motion to consolidate is GRANTED.

CONCLUSION

For the forgoing reasons and for good cause shown, the Court finds that the requirements of Rule 23(a) and (b)(2) have been satisfied, and determines that, subject to the terms and limitations discussed above, the actions may be maintained as a class action pursuant to the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

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[5] This case was then pending before the Hon. Vaughn Walker.

Appendix C

Dated: January 24, 1996.

s/Susan Illston
SUSAN ILLSTON
United States District Judge

APPENDIX D — ORDERED OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA IN COMPANION CASE *GRIFFIN, ET AL. V. HOME DEPOT* FILED MAY 20, 1996

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION

NO. 95-181

SECTION "L"

CAROL LEE GRIFFIN, et al.

VERSUS

HOME DEPOT, INC.

ORDER AND REASONS

Before the Court is defendant Home Depot, Inc.'s Motion to Dismiss the Class Action Aspects of this Case. This motion was taken under submission on the briefs. For the following reasons, the defendant's motion is denied.

BACKGROUND

The named plaintiffs in this matter include Carol Lee Griffin, Bonnie Bamber, Forrestine Holmes, and Patricia Toural (collectively "Plaintiffs"). Ms. Griffin was employed by Home Depot as a designer in New Orleans, Louisiana from February 5, 1991 until her discharge on June 3, 1994. Ms. Bamber was employed by Home Depot as a cashier in Nashville, Tennessee from August 26, 1992 through November

8, 1993, and subsequently employed as a cashier in Baton Rouge, Louisiana from November 12, 1993 until her discharge on November 13, 1994. Ms. Holmes was employed by Home Depot as a cashier in Baton Rouge, Louisiana from March 27, 1990 until her recent resignation. Ms. Toural was employed by Home Depot as a cashier, sales representative, and cashier supervisor in New Orleans and Baton Rouge, Louisiana from July 17, 1986 until her layoff on April 29, 1994.[1]

The plaintiffs filed the complaint with this Court on January 17, 1995 alleging both disparate treatment and disparate impact sex discrimination under Title VII. 42 U.S.C. §§ 2000e-2000e-17. The complaint was filed on behalf of themselves and on behalf of all past, present, and future female employees and applicants in Home Depot's Southeast, Northeast, Midwest and Midsouth Regions who have been or may be denied employment, desirable working hours, compensation and/or other terms and conditions of employment on the basis of sex. The plaintiffs seek not only injunctive and declaratory relief, but also damages for back pay, front pay, lost compensation and job benefits, emotional distress, humiliation, embarrassment, exemplary and punitive damages, attorneys' fees, and pre-judgment and post-judgment interest.

Home Depot has moved to dismiss the class action aspect of this case contending that based on the plaintiffs' allegations and the current state of the law, particularly the enhanced remedies provided under the 1991 Civil Rights Act, the plaintiffs' sex discrimination claims cannot be maintained on a

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[1] The parties have agreed to settle Ms. Toural's claim by reinstating her to employment, and she presumably will no longer be a party to this action.

class action basis because the plaintiffs cannot meet the requirements of either Fed. R. Civ. P.23(b)(2) or (b)(3). At this time, the Court does not agree with this assertion.

LEGAL STANDARD

In deciding whether to certify a class, the court must perform a rigorous analysis of whether the class satisfied Federal Rule of Civil Procedure 23. However, the court may not inquire into the merits of the underlying case. *Heartland Communications, Inc. v. Sprint Corp.*, 161 F.R.D. 111 (D. Kan. 1995). The court must assume that the substantive allegations of the complaint are true. *Krehl v. Baskin-Robbins Ice Cream Co.*, 78 F.R.D. 108 (C.D. Cal. 1978).

ANALYSIS

In order for class certification to be appropriate, the plaintiffs must establish that their class satisfies all of the requirements of Fed. R. Civ. P. 23(a) and at least one of the subsections of Fed. R. Civ.P.23(b). Rule 23(a) has four requirements: numerosity, commonality, typicality, and adequacy of representation. The parties, for the purposes of this motion, do not dispute that these four requirements are satisfied. As such, the plaintiffs must establish that they meet at least one of the subsections under Rule 23(b).

The plaintiffs argue that the class they seek to represent should be certified under Rule 23(b)(2) or (b)(3). The defendant argues that, as a matter of law, the plaintiffs cannot meet the requirements of either subsection. While the case law is sparse in this area of the law, there are two schools of thought on this issue which are supported by two competing cases: *Celestine v.*

Appendix D

Citgo Petroleum Corp., No. 93-864, slip op.at 6 (W.D.La. filed Aug. 7, 1995), *aff'd by Dist. Court*, 1995 WL 811969 (W.D. La. Sept. 11, 1995) (supporting the defendant's position) and *Butler v. Home Depot, Inc.*, 94-4335, slip op. (N.D. Cal. Jan. 25, 1996) (representing the plaintiffs' contentions).

1. *Certification Under Rule 23(b)(2)*

Rule 23(b)(2) provides:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> > (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

The primary limitation on certification under Rule 23(b)(2) is that injunctive and/or declaratory relief must be the predominate relief sought for the class. *Celestine v. Citgo Petroleum Corp.*, No. 93-864, slip op. at 6 (W.D. La. filed Aug. 7, 1995), *aff'd by Dist. Court*, 1995 WL 811969 (W.D. La. Sept. 11, 1995). Home Depot argues that since the passage of the Civil Rights Act of 1991, which allowed compensatory and punitive damages in cases involving intentional discrimination, class certification in Title VII cases is inappropriate.[2]

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[2] The Civil Rights Act of 1991 authorized the recovery of

(continued...)

Appendix D

Home Depot bases its argument on the *Celestine v. Citgo Petroleum Corp.*, supra. decision. In *Celestine*, the court concluded that the plaintiffs' demand for monetary damages precluded certification under Rule 23(b)(2). The court found that the issues surrounding the claims for injunctive relief and monetary damages were unrelated. *Celestine*, slip op. at 9. "The claim for injunctive relief requires the plaintiffs to show that there are policies and procedures which have a disparate impact on [female] employees and applicants while the claim for monetary damages requires each plaintiff to show that . . . she was actually adversely affected by the policies and procedures in place." *Id.* at 9-10. The court reasoned that because it would be necessary for the plaintiffs to present individualized evidence at separate hearings, monetary damages was the predominate type of relief sought. *Id.* at 10. Thus, class certification under Rule 23(b)(2) was not appropriate in that case.

However, a district court in the Ninth Circuit presented with this issue has reached another result. In *Butler v. Home Depot, Inc.*, 94-4335, slip op. (N.D. Cal. filed Jan. 25, 1996), a number of women employees of Home Depot alleged gender discrimination under Title VII and moved for class certification. When confronted with the Rule 23(b)(2) issue, the court found that the defendant's arguments that the plaintiffs' claims for monetary damages overwhelmed their claims for injunctive relief were "conclusory and, at this early stage, speculative." *Id* at 10. The *Butler* court believed that the plaintiffs' allegations that the defendant maintained

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[2] (...continued)
compensatory and punitive damages in cases involving intentional discrimination. 42 U.S.C. § 1981(a)(1). Prior to the passage of the Act, Title VII only afforded equitable relief.

discriminatory policies and practices were sufficient to satisfy the Rule 23(b)(2) requirements. *Id.*

This Court agrees with the reasoning of both *Butler* and *Celestine* on this issue. The defendant contends the Court should ignore *Butler* on the grounds that it is based solely on Ninth Circuit precedent and thus should be ignored by this Court in favor of *Celestine* which they say is based on Fifth Circuit case law. To the contrary, *Celestine* cites to a majority of cases from the Ninth Circuit and does not depend on Fifth Circuit law for its holding.[3] This Court does not find that Fifth Circuit precedent precludes the *Butler* reasoning in this instant. Thus, the Court agrees with *Butler* in that the 1991 amendments, giving victims of gender discrimination greater remedies, do not preclude the possibility of a class action in these types of cases. Such a finding is not supported by the legislative history of the amendments nor logical in light of Congress' intent. *See* House Report 102-40 (Part II), 102nd Cong. (May 17, 1991).[4]

Having found that the Civil Rights Act of 1991 does not preclude a class action under Rule 23(b)(2), the Court still must look at the pleadings in this case to determine if a class action is viable under the (b)(2) subsection. As stated above, the plaintiffs seek damages in the form of back pay, front pay, lost

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[3] There are very few cases which have actually addressed the issues raised in this motion which would explain the *Celestine* court's reliance on case law outside this circuit.

[4] This Court believes that Congress' intent was simply to make available to victims of intentional gender and religious discrimination the same remedies which are allowed for victims of intentional race discrimination.

compensation, job benefits, emotional distress, humiliation, embarrassment, punitive damages, and attorney's fees along with injunctive and declaratory relief. This Court finds that the predominate relief sought by this class is economic and not injunctive and/or declaratory. Therefore, possible certification of this class under Rule 23(b)(2) in not appropriate in this case.

2. *Certification Under Rule 23(b)(3)*

Rule 23(b)(3) provides in pertinent part:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> > (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Therefore, in considering certification under Rule 23(b)(3), a court should consider not only commonality but also manageability and judicial economy. *Forbush v. J.C. Penney Co., Inc.*, 994 F.2d 1101, 1104-05 (5th Cir. 1993).

Again, Home Depot relies on *Celestine* to argue that class action jury trials are not the most efficient manner of handling suits alleging intentional discrimination. *Celestine*, slip op. at 12. "If the court were to certify the injunctive claims a class

action wherein the pattern or practice claims would be tried to a jury and the disparsate impact claims would be tried to the judge, the pattern or practice claims would also have to be relitigated in each plaintiff's disparate treatment and damages cases if the parties' assertion that they are entitled to have the same jury determine liability and damages is true." *Id.* at 12-13.

In contrast, the *Butler* court determined that the case would best be handled if bifurcated. The *Butler* court noted that courts routinely certify classes in similar employment discrimination cases by separating the trials into two phases. *Butler*, slip op. at 11 (citing *Arnold v. United Artists Theater Circuit, Inc.*, 158 F.R.D. 439 (N.D. Cal. 1994)). In the first phase, class-wide damages and injunctive relief are determined. In the second phase, the individual compensatory damages issues are resolved. *Butler*, slip op. at 11. Because the second phase would involve adjuicating individual compensatory damage claims, it would not involve the same issues as did the first phase involving liability. *Id.* at 12. Furthmore, the Seventh Amendment does not mandate that all phases of the litigation be heard by the same jury. *Id.* at 12-13. While the court ruled class certification was proper for the first phase, the liability phase of the trial, the court deferred ruling on the issue of class certification with respect to the second phase of the trial. *Id.* at 13.

This Court agrees with the *Butler* decision that a case such as this one can be managed as a class action. Therefore, the issues of manageability and judicial economy do not preclude a class action here under Rule 23(b)(3). But the analysis does not end there, the Court must also determine if there are questions of law and fact common to all members of the proposed class. This is necessarily a fact specific inquiry. At present, no

discovery has been done and the Court has only the pleadings before it. At this juncture, one can postulate that there is sufficient commonality of facts to satisfy Rule 23(b)(3) but the plaintiff faces a considerable burden on this point.

Therefore, considering the posture of this case and the nature of this motion, this Court finds, at this time, the allegations made by the plaintiff are sufficient to meet the requirements of Rule 23(b)(3). This aspect of class certification may be revisited by the Court after the parties have pursued some discovery on these issues.

CONCLUSION

THEREFORE for the foregoing reasons IT IS ORDERED that defendant Home Depot's motion to dismiss the class action aspect of this case HEREBY DENIED at this time.

New Orleans, Louisiana, this 19 day of May, 1996.

s/Eldon E. Fallon
UNITED STATES DISTRICT JUDGE

APPENDIX E -- FEDERAL RULE OF CIVIL PROCEDURE 23(b)(2) -- CLASS ACTIONS

Rule 23. Class Actions

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole;

APPENDIX F --UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21--CIVIL RIGHTS
SUCHAPTER I--GENERALLY
Current through P.L. 104-207, approved 9-30-96

§ 1981a. Damages in cases of intentional discrimination in employment

(a) Right of recovery

(1) Civil rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) [42 U.S.C.A. §§ 2000e-5 or 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3) [42 U.S.C.A. §§ 2000e-2, 2000e-3, or 2000e-16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e-5(g)], from the respondent.

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(2) Disability

In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C.A. §§ 2000e-5 or 2000e-16] (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 794a(a)(1) of Title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of Title 29 and the regulations implementing section 791 of Title 29, or who violated the requirements of section 791 of Title 29 or the regulations implementing section 791 of Title 29 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act [42 U.S.C.A. § 12112(b)(5)], against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e-5(g)], from the respondent.

(3) Reasonable accommodation and good faith effort

In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 [42 U.S.C.A. § 12112(b)(5)] or regulations implementing section 791 of Title 29, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

(b) Compensatory and punitive damages

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

(2) Exclusions from compensatory damages

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e-5(g)].

Appendix F

(3) Limitations

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party--

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

(4) Construction

Nothing in this section shall be construed to limit the scope of, or the
relief available under, section 1981 of this title.

Appendix F

(c) Jury trial

If a complaining party seeks compensatory or punitive damages under this section--

(1) any party may demand a trial by jury; and

(2) the court shall not inform the jury of the limitations described in subsection (b)(3) of this section.

(d) Definitions

As used in this section:

(1) Complaining party

The term "complaining party" means--

(A) in the case of a person seeking to bring an action under subsection (a)(1) of this section, the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or

(B) in the case of a person seeking to bring an action under subsection (a)(2) of this section, the Equal Employment Opportunity Commission, the Attorney General, a person who may bring an action or proceeding under section 794a(a)(1) of Title 29, or a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.) [42 U.S.C.A. § 12111 et seq.].

Appendix F

(2) Discriminatory practice

The term "discriminatory practice" means the discrimination described in paragraph (1), or the discrimination or the violation described in paragraph (2), of subsection (a) of this section.

APPENDIX G — ORDER OF THE UNITED STATES DISTRICT COURT DISTRICT COURT OF NEW JERSEY

Civil Action No. 96-2927

MARJORIE TORTAJADA,
individually and on behalf
of all others similary situated, Plaintiff,
vs.

HOME DEPOT, INC.,
Defendant,

ORDER

This matter having come before the Court pursuant to the motion of the defendants to dismiss the class action aspects of the case at bar; and the Court having read and considered the papers submitted in support of and in opposition to said motion; and the Court having heard and considered the arguments of counsel; and the Court having explored with counsel the similarities between the case at bar and the matter of *Carol Lee Griffin v. Home Depot, Inc.*, currently pending in the United States District Court for the Eastern District of Louisiana (Civil No. 95-181§L); and good cause having been shown for the entry of the within Order, for the reasons expressed by the Court, on the record, on November 12, 1996,

It is on this 19th day of November, 1996, ORDERED that:

(1.) Defendant's motion is dismissed, without prejudice;

(2.) This action be, and it hereby is, stayed as to all class action claims and issues, until further order of this Court, for good cause shown; and

Appendix G

(3.) This case shall continue, at this time before this Court, as an individual action by the plaintiff on the claims presented.

S/John W. Bissell
JOHN W. BISSELL
United States District Judge

Supreme Court, U.S.
FILED
JAN 27 1997
CLERK

No. 96-943

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

HOME DEPOT, U.S.A., INC.,
Petitioner,
v.
VICKI BUTLER, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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IN THE

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HOME DEPOT, U.S.A., INC.,
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council (EEAC) respectfully submits this brief as *amicus curiae*. The written consents of all parties have been filed with the Clerk of this Court. The brief supports the petition for writ of certiorari.

INTEREST OF THE *AMICUS CURIAE*

EEAC is a voluntary association of employers organized to promote sound approaches to the elimination of employment discrimination. Its membership includes nearly 300 major U.S. corporations, as well as several associations which themselves have hun-

dreds of corporate members. EEAC has a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

EEAC's members are employers subject to Title VII of the Civil Rights Act of 1964, as well as other employment laws and regulations. As large employers, they represent likely targets for the sort of broad-based class action suits at issue in this case. Thus, EEAC has an interest in the procedures under which Title VII class action cases are litigated.

In the instant case, in which class-based claims of both disparate impact and disparate treatment have been raised in connection with alleged sex discrimination in hiring and promotion, the Ninth Circuit left intact a class certification and related bifurcation order that is fundamentally unworkable and violates the defendant employer's rights under the Seventh Amendment to the United States Constitution. In particular, the District Court directed that the litigation be divided into two stages—a liability stage and a damages stage. A "common issues" jury is to determine liability and punitive damages, and one or more "follow-up" juries then will determine other damages for individuals.

If this order stands, the initial liability phase of the litigation will be unworkable, because liability for disparate treatment on claims such as those presented here, and for punitive damages, cannot be determined solely on the basis of "common issues." Furthermore, the "follow-up" juries, inevitably, will have to con-

sider issues already decided by the initial jury. EEAC members are concerned that employers' constitutional rights are being trammeled in these sorts of proceedings. Moreover, this approach to employment discrimination litigation creates undue and unfair pressure on employers to settle cases, regardless of their merit.

The issues presented in the petition, therefore, are extremely important to the nationwide employer constituency that EEAC represents. Because of its interest in such issues, EEAC has filed *amicus curiae* briefs in a number of other cases involving class actions under Title VII and the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (ADEA). *E.g., K-Mart Corp. v. Helton, cert. denied,* —— U.S. ——, 136 L.Ed.2d 342 (1996) (use of ADEA representative action to challenge corporate downsizing involving numerous locations); *Grayson v. K Mart Corp.*, 79 F.3d 1086 (11th Cir. 1996) (same case); *Hoffmann-La Roche Inc. v. Sperling*, 493 U..S 165 (1989) (scope of federal court's discretion to facilitate notice to potential plaintiffs in representative class actions under ADEA); *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147 (1982) (proper class representative under Title VII).

Thus, EEAC has an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Indeed, because of its experience in these matters, EEAC is well situated to brief the Court on the implications of the issues beyond the immediate concerns of the parties to the case.

This brief is timely as it is being filed within the time allowed in Supreme Court Rule 37.2 for filing a brief in support of the petition for writ of certiorari.

STATEMENT OF THE CASE

On December 21, 1994, Vicki Butler and several other women (hereinafter "Plaintiffs") filed a complaint in the United States District Court for the Northern District of California alleging unlawful sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), and the California Fair Employment & Housing Act, Cal. Gov't Code § 12900 *et seq.*, against female employees and applicants throughout Home Depot's West Coast Division. Plaintiffs allege that Home Depot discriminates on the basis of gender in nearly all aspects of employment including: (1) hiring and initial job placement; (2) training; (3) transfer opportunities to merchandising positions; (4) promotional opportunities to supervisory and management positions; and (5) compensation.

On Plaintiffs' motion, the District Court certified a gender-based class under Federal Rule of Civil Procedure 23(b)(2). The court defined the class as follows:

> A. All female employees of Home Depot within the geographical area of Home Depot's West Coast Division who are or were employed on or after November 5, 1992, or who are or will be employed between this date and the date of entry of judgment in this class action; and
>
> B. All female applicants who applied for employment in Home Depot stores within the geographical area of Home Depot's West Coast Division on or after November 5, 1992 and were qualified for employment in the positions of salespersons or assistant managers and who were not hired or were hired for cashier or other positions.

(Pet. App. at 11a-12a.) By Home Depot's calculations, that class comprises approximately 217,000 members, including roughly 17,000 employee members and 200,000 applicant members, in 10 western states.

The District Court further ordered that the litigation proceed in two phases. The initial phase is to address "liability and relief applicable to the class as a whole . . . and whether defendant is liable for punitive damages." (Pet. App. at 12a.) If discrimination is found, the parties will proceed to the next phase, where "individual compensatory and equitable relief, including entitlement to back and front pay" will be addressed. (Pet. App. at 12a.)

Home Depot asked the District Court to certify the issues relating to class certification for interlocutory appeal. After the court denied that request, Home Depot petitioned the Ninth Circuit Court of Appeals for a writ of mandamus directing the district court to vacate its order certifying the class, and to enter a new order denying class certification and dismissing the class claims. The Ninth Circuit denied the petition and rejected Home Depot's subsequent request for a rehearing *en banc*.

On December 12, 1996, Home Depot filed the instant petition for a writ of certiorari.

SUMMARY OF REASONS FOR GRANTING THE WRIT

As a result of the Civil Rights Act of 1991, which made compensatory and punitive damages, as well as jury trials, available for the first time to plaintiffs alleging intentional discrimination under Title VII of the Civil Right Act of 1964, 42 U.S.C. § 2000e

et seq., new and important issues have emerged regarding the constitutionality and propriety of permitting such claims to proceed as class actions. A special problem arises when courts bifurcate employment discrimination class action litigation to be decided by juries into two stages: a liability stage and a damages stage, where one "common issues" jury is to sit for the first phase and one or more "follow-up" juries is to sit for the second phase. Such bifurcation schemes may appeal to courts as a means of attempting to manage large class action litigation, where there are significant common as well as individual claims to resolve. But, bifurcation is fundamentally unavailing in cases such as this one, where liability cannot be established on the disparate treatment issues without individualized consideration of thousands of separate personal transactions. Moreover, such bifurcation schemes violate the Seventh Amendment to the U.S. Constitution when they result in more than one jury assessing the same set of facts.

These problems are unavoidable in large intentional discrimination class actions, where damages are sought. Such claims inevitably raise interrelated and overlapping issues that cannot be divided neatly for separate consideration by different juries. For example, facts showing the existence of a pattern of discrimination bear on individual claims of discrimination, and vice versa. At the same time, liability to individual claimants cannot be established without particularized consideration of their qualifications and the employer's reasons for not hiring, promoting, or retaining them. Similarly, defenses raised to rebut general claims of discrimination may also pertain to individual claims of discrimination. Finally, the individual's entitlement to punitive damages depends

in large part on the type of discriminatory actions directed toward the individual and the injury suffered as a consequence. There is simply no neat way for two juries to resolve issues of liability and damages in intentional employment discrimination cases without going over many of the same facts, resulting in cumbersome duplication of efforts as well as a violation of the Constitution.

Through the improper certification and bifurcation of such suits, tremendous pressure is placed upon employer defendants to settle, regardless of the merits of the claims, rather than to bear the inherent costs and risks entailed in proceeding with such expansive and duplicative litigation. Such a result is unfair to employers and does nothing to advance the cause of equal employment opportunity.

Given the importance of the issues raised by this case and the increasing frequency with which such issues are likely to arise, Supreme Court review is appropriate.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT REVIEW OF THE DECISION BELOW TO ADDRESS A GROWING TREND AMONG EMPLOYMENT DISCRIMINATION CLAIMANTS TOWARD ABUSIVE USE OF CLASS ACTION PROCEDURES

A. Since Jury Trials and Compensatory and Punitive Damages Became Available in Title VII Cases in 1991, Class Action Procedures Have Been Used Repeatedly to Deprive Employers of Constitutional Rights

With the enactment of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C.), the character of fed-

eral employment law and litigation changed dramatically. Most relevant to this case, the new law makes compensatory and punitive damages available to plaintiffs under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, whereas only equitable relief had been available before. 42 U.S.C. § 1981a(a)(1). It also provides both plaintiffs and defendants with the new right to jury trials in cases where such damages are sought. 42 U.S.C. § 1981a(c)(1).

These added remedies, however, come with limitations. To start, compensatory and punitive damages are available only in cases of intentional discrimination, *i.e.*, disparate treatment cases, not in disparate impact cases. 42 U.S.C. § 1981a(a)(1). In addition, punitive damages may be recovered only where the plaintiff demonstrates that an employer "engaged in a discriminatory practice or discriminatory practices with malice or reckless indifference to the federally protected rights of an aggrieved *individual*." 42 U.S.C. § 1981a(b)(1) (emphasis added). As both limitations reflect, damages are available only where a plaintiff personally has been the target of intentional discrimination. Finally, in all such instances, damages are subject to a cap of up to $300,000, depending on the size of the employer. 42 U.S.C. § 1981a(b)(3).

The highly individualized nature of damage awards is also reflected in the requirements courts impose upon plaintiffs to show proof of actual harm in order to recover compensatory damages. Indeed, absent significant corroborative evidence supporting the existence of a specific discernible injury, many courts will award no more than nominal damages. *See Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927 (5th Cir. 1996), *cert. denied*, 65 U.S.L.W. 3505 (U.S. Jan. 21, 1997) (No. 96-734) (finding district court's award of $150,000 for emotional distress in a Title VII claim

an abuse of discretion, given that the only evidence plaintiff offered to support his claim was testimony about his feelings); *Hetzel v. County of Prince William*, 89 F.3d 169 (4th Cir.), *cert. denied*, 117 U.S. 584 (1996) (setting aside a $500,000 jury award, finding that plaintiff's conclusory statements regarding her mental suffering, without more, were insufficient to justify her award).

By making money damages available to plaintiffs, the 1991 Civil Rights Act created additional incentives for individuals to file suit. Today's Title VII plaintiff may be out to vindicate her rights and change her workplace, or she may simply be motivated by the opportunity to receive money damages. The increase in the number of employment discrimination lawsuits filed since the Act was passed suggests that, at least in part, the money matters.[1]

Enterprising plaintiffs' attorneys, too, have been motivated by the increased opportunities the Act presents. They have been quick to recognize that the potential value of a lawsuit, in terms of damages alone, is largely a factor of the number of plaintiffs that can be brought together. While the claim of one plaintiff may be worth no more than $300,000, the claims of 20 are potentially worth $60 million, and the claims of 200,000 theoretically are worth as much as $60 billion.

Since 1991, plaintiffs' attorneys increasingly have turned to class actions as the vehicles to bring to-

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[1] In 1991, 8,140 employment discrimination cases were filed in federal courts across the country. That number increased annually to 23,152 for the twelve month period ending September 30, 1996. Administrative Office of the United States Courts, Reports of the Proceedings of the Judicial Conference of the United States (1991, 1996).

gether large groups of potential plaintiffs to seek damages. In 1991, 32 class actions alleging employment discrimination were filed in the federal courts. By the twelve month period ending in September of 1996, just under four years after the Civil Rights Act was enacted, that figure had more than doubled to reach 68, according to the Administrative Office of the United States Courts.[2]

With this new crop of post-Civil Rights Act of 1991 class actions have come new procedural issues that raise important questions of case management, as well as Seventh Amendment questions relating to employers' jury trial rights. These issues arise when courts attempt to bifurcate class action suits involving claims of intentional discrimination into two stages: a liability stage and a damages stage, where one jury is to sit for the first phase and one or more follow-up juries is to sit for the second phase. In the context of claims of intentional employment discrimination, this procedure not only fails to achieve the efficiency that is the raison d'être of class actions, but also leads inevitably to more than one jury assessing some of the same facts in a case—a violation of the Seventh Amendment.

1. ***The Use of Class Action Procedures in Cases Involving Thousands of Separate Employment Decisions Is Fundamentally Unworkable***

As touched upon above, intentional employment discrimination claims, particularly those in which compensatory and punitive damages are sought, are highly individualized in terms of the proof that is required to make them out and to defend against them. When thousands of such claims are presented

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[2] *Id.*

to a court in the form of a class action, case management concerns immediately arise.

In this case, the District Court's answer to these concerns was bifurcation. But where liability hinges on the circumstances surrounding each of thousands of separate employment transactions, bifurcation solves little. It can only result in repetitive consideration of the same issues. It can do little to expedite the liability determination, because, unless some intentionally discriminatory, across-the-board policy or practice is involved, liability for disparate treatment cannot be established without considering each individual's relative qualifications for a specific position, the employer's proffered reasons for not selecting or retaining that individual, and whether or not those reasons are pretext for discrimination.[3] *See, e.g., St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993). Thus, the liability phase of such a proceeding inevitably becomes a cumulative series of mini-trials—in this case, potentially hundreds of thousands of them.

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[3] The need for such individualized findings will also exist in Stage II of the bifurcated proceedings, where individual entitlement to damages is to be established. The necessity for repeated focus, in both stages of the bifurcated proceeding, on facts pertaining to intentional discrimination and the resulting harm experienced by individuals, raises another important question. That is, whether class certification is ever appropriate under Rule 23(b)(2) for claims of intentional employment discrimination, where compensatory and punitive damages are sought. For, in order to meet the requirements for such certification, plaintiffs must demonstrate that claims in the suit for injunctive or declaratory relief "predominate" over claims for money damages. Fed.R.Civ.P. 23(b)(2) advisory committee's notes. Under the circumstances discussed above, it is difficult to imagine when that would ever be the case.

Cf. Celestine v. Citgo Petroleum Corp., 165 F.R.D. 463, 469-71 (W.D.La. 1995).

The District Court in this case simply ignored these problems. It ordered that in Stage I, the jury is to decide claims relating to "liability and relief applicable to the class as a whole, including declaratory and injunctive relief, and whether defendant is liable for punitive damages." (Pet. App. at 12a.) "Testimony by individual employees in Stage I would be for illustrative purposes, either to support or to rebut plaintiffs' class-wide contentions," the Court noted. (Pet. App. at 7a.) If liability is established, the parties will proceed to Stage II, where "appropriate individual compensatory and equitable relief" will be determined. (Pet. App. at 12a). In so ordering, the District Court failed to recognize that, to determine liability in the first instance, the court will have to look beyond "common issues" and assess the facts and circumstances of thousands of individual decisions.

2. *Claims of Intentional Employment Discrimination, Particularly When Coupled With Demands for Compensatory and/or Punitive Damages, Inevitably Raise Interrelated and Overlapping Issues That Cannot Be Separated for Consideration by Different Juries*

A further problem with the bifurcation procedures in this case is that, in the context of intentional employment discrimination cases, the relevant facts do not divide neatly between those pertaining to liability and those pertaining to damages. Indeed, many facts are relevant to both issues.

For example, in Stage I, facts concerning general bias as well as individual discrimination will be offered in order to establish liability. Similarly, facts

constituting general and specific defenses will be offered to rebut such allegations. Some of these facts —both the claims and defenses—undoubtedly will be raised again in Stage II proceedings, as individuals seek to prove they have suffered from discrimination and are entitled to relief.

In addition, in the case at bar, the District Court has ruled that punitive damages will be resolved in Stage I. Whether and in what amount punitive damages are appropriate, however, depends in significant part on the actions directed toward individuals and the harm suffered thereby. As this Court recently held in *BMW of North America v. Gore*, 116 S. Ct. 1589, 1598-99 (1996), the reasonableness of a punitive damages award depends, in significant part, on the degree of reprehensibility of the defendant's conduct and the harm suffered because of it. Lower courts have found the *BMW* guidelines instructive in assessing the propriety of damage awards under Title VII. *See, e.g., Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 943 (5th Cir. 1996). Again, there is no way to resolve this issue in Stage I without going into at least some of the factual issues supposedly reserved for Stage II.

As these examples reflect, bifurcated litigation of intentional employment discrimination claims inevitably will require review of the same facts by at least two different juries. As discussed below, such a result is unconstitutional.

3. *Submission of Interrelated and Overlapping Issues to Separate Juries in Bifurcated Class Action Proceedings Deprives Employers of Fundamental Rights Under the Seventh Amendment*

The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. Const. amend. VII. This Court has interpreted the Seventh Amendment to protect parties from having more than one jury try the facts of their cases, except where the issues are so distinct and independent that no injustice would result. *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931). *See also Castano v. American Tobacco Co.*, 84 F.3d 734, 750-51 (5th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir.), *cert. denied*, 116 U.S. 184 (1995).

As discussed in the previous section, intentional employment discrimination cases, particularly where damages are sought, are imbued with interrelated and overlapping issues not amenable to division. Accordingly, where such cases are bifurcated, more than one jury inevitably ends up reviewing the same facts. Such a result deprives employers of their constitutional rights.

B. The Improper Use of Class Action Procedures Places Employers Under Enormous Pressure to Settle Cases Without Regard to Their Merits or Lack Thereof

Although Congress limited the damages recoverable under the Civil Rights Act of 1991 to $300,000 per complaining party, plaintiffs' lawyers have discovered a way to magnify greatly the awards that can be obtained through a single lawsuit. By bringing huge class actions, they have been able to create lawsuits with potential value in the billions of dollars.

In the case at bar, Home Depot estimates that there are currently more than 217,000 potential class members. Each member of the class who can demonstrate she was a victim of intentional discrimination may be awarded up to $300,000 in compensatory and punitive damages alone. Theoretically, then, Home Depot's potential liability for damages alone is $65.1 billion (217,000 x $300,000). This does not include potential back pay awards, to which each class member, conceivably, would be entitled. Nor does it take into account Home Depot's litigation costs, which undoubtedly would be immense.

Once plaintiffs obtain class certification in a lawsuit of this type, the defendant's exposure is so enormous as to place almost irresistible pressure on the defendant to settle, regardless of the merits of the claims.[4] Even if the odds of individuals prevail-

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[4] In addition, the district court's decision will encourage frivolous claims. Indeed, the importance of having a meritorious claim in the first place is significantly diminished under the district court's reasoning. The merit of a particu- Title VII claim depends on the conduct of both the defendant and the individual plaintiff. An individual's qualifications, job performance and conduct are inexorably intertwined with the liability determination. The first jury cannot possibly

ing in their intentional discrimination cases are low, defendant's exposure remains absurdly high.

For example, in this case, even if each plaintiff class member had only a one in five chance of prevailing and won only a $30,000 award, defendant's exposure still would be more than a billion dollars (217,000 x 1/5 x $30,000 = $1,302,000,000). Again, this would not include attorney and expert fees and other litigation costs. Indeed, the fees and costs alone relating to the preparation of 217,000 individual defense would be virtually prohibitive. And, defendant would have to pay these costs, even if it prevailed on *every claim* in the second stage of the litigation.

In the face of these numbers, companies have little choice but to cut their losses through settlement. Judge Posner discussed this phenomenon at some length in his decision in *In re Rhone-Poulenc Rorer Inc.* When companies are looking at billions of dollars in potential liability and with it bankruptcy, he observed, "[t]hey may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle." 51 F.3d at 1298-99. *See also Castano v. American Tobacco Co.*, 84 F.3d at 747.

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make these determinations properly, especially in this case where the class could number over 200,000. Nonetheless, all claimants, no matter how frivolous their individual claims, will proceed to the second stage if some claimants are found to have been discriminated against in the first. At the second stage, the employer has effectively been assigned the burden of disproving each individual meritless claim in front of a jury that has already been told that the employer discriminates. This *de facto* shifting of the burden of proof is inconsistent with *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)—which holds that the burden of proving discrimination always remains with the plaintiff—and undoubtedly will lead to countless frivolous claims.

Aside from being inherently unfair and unconstitutional, this result accomplishes little in terms of identifying or remedying actual instances of employment discrimination. For once a class is certified, setting up the prospect of huge litigation expenses and creating the risk of a billion dollar judgment, cases are likely to settle before the merits of the claims of discrimination are even explored. In the end, nobody knows whether the employer discriminated or not—only that it paid a lot of money to get out of a no-win situation in which it never should have been placed.

CONCLUSION

For the foregoing reasons, the *amicus curiae*, EEAC respectfully requests that the Court grant certiorari in this case.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1996

HOME DEPOT U.S.A., INC.,

Petitioner,

v.

VICKI BUTLER, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit abused its discretion by denying Home Depot's petition for writ of mandamus which raised purely hypothetical issues and sought reversal of the district court's interlocutory order bifurcating the trial into liability and damages phases and certifying the liability phase under Federal Rule of Civil Procedure 23(b)(2)?

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STATEMENT OF THE CASE

This employment discrimination class action was filed by ten women, the respondents, who are current and former employees of petitioner, Home Depot U.S.A., Inc. ("Home Depot"). Respondents represent a class that includes female applicants to Home Depot's West Coast Division ("WCD") and former and current female employees of the WCD.

1. *Complaint Allegations.* Respondents allege that in the WCD Home Depot maintains a continuing policy and practice of denying employment, desirable job assignments, training, promotional opportunities, compensation and other terms and conditions of employment to women, in violation of Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000(e), *et seq.*, and the California Fair Employment & Housing Act, Cal. Gov't Code §§ 12900 *et seq.* Respondents contend that, in general, Home Depot segregates women into low-paying, dead-end cashier jobs, while placing men in sales positions where they are provided higher wages as well as the opportunity, encouragement, and training to move up Home Depot's promotional ladder. Respondents further allege that Home Depot allows its store managers, virtually all of whom are male, to make hiring, promotion, and compensation decisions based on vague and subjective criteria, and that this practice gives free reign to male managers' discriminatory stereotypes about women's interests and abilities.

Respondents request declaratory and injunctive relief, equitable relief in the form of back pay and front pay, and damages, to remedy the injuries sustained as a result of Home Depot's discriminatory policies and practices.

2. *The Class Certification Order.* After full briefing and oral argument, the district court ordered that the trial in this case would be bifurcated into two phases. *See* Petitioner's Appendix ("Pet'r App.") at 11a-12a. The first phase "will address liability and relief applicable to the class as a whole, including declaratory and injunctive relief, and whether defendant is liable for punitive damages." *Id.* at 12a. The court certified the first phase of the action under Federal Rule of Civil Procedure ("Rule") 23(b)(2).[1]

The district court did not determine whether it would certify the second phase under Rule 23(b)(2) or Rule 23(b)(3), if at all.[2] The district court also deferred determination of whether the same jury, a different jury, or some other procedure would be used to resolve the second phase. That determination will be made if and when Home Depot is actually found liable for classwide discrimination: "If liability is established, the second

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[1] The class certified for the liability phase includes (a) all female employees of Home Depot within the WCD on or after November 5, 1992; and (b) all female applicants for employment at Home Depot within the WCD on or after November 5, 1992 who were qualified to fill positions of salespersons or assistant managers but who were not hired for those positions. Pet'r App. at 11a-12a.

[2] Certification of a class is appropriate under Rule 23(b)(2) where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Rule 23(b)(2), unlike Rule 23(b)(3), does not provide class members the right to "opt out" of monetary relief. District courts are authorized, pursuant to Rules 23(c)(4) and 16(c)(12)-(13), to certify a class with respect to particular issues and to bifurcate complex actions involving multiple parties.

phase will address appropriate individual compensatory and equitable relief, including individual entitlement to back and front pay. The precise procedures to be used during the second phase, if any, will be determined later in this litigation." Pet'r App. at 12a.

The district court rejected Home Depot's argument that bifurcation of liability and damages would violate its Seventh Amendment right to a fair trial, even if different juries were empaneled to hear the two phases of the trial. The court noted that trial courts routinely bifurcate liability and damages issues, and that the Seventh Amendment only prohibits the reconsideration of a prior jury's determination. Because the separate juries in this case would be considering different issues, Home Depot's Seventh Amendment claim had no merit. Pet'r App. at 23a.

The district court also rejected Home Depot's claim that certification of the liability phase under Rule 23(b)(2) is improper, finding that in the liability phase, respondents' "claims for damages are clearly secondary to their primary claim for injunctive relief to prohibit gender-biased employment practices." Pet'r App. at 20a.[3]

3. *The Petition for Writ of Mandamus.* Home Depot requested the district court to certify its class certification order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The district court denied that request. Home Depot then petitioned the Ninth Circuit for a writ of mandamus to compel the district court to vacate its order

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[3] Home Depot did not argue that certification under Rule 23(b)(2) violates the Due Process Clause of the Fifth Amendment. That claim is raised by Home Depot for the first time in its petition for writ of certiorari. *See infra* Section III.

certifying the class, enter a new order denying certification, and dismiss the class allegations. The Ninth Circuit denied Home Depot's request for the extraordinary remedy of mandamus. Pet'r App. at 1a-2a.

REASONS THE WRIT SHOULD BE DENIED

The only question presented by this petition is whether the Ninth Circuit abused its discretion by denying Home Depot's petition for writ of mandamus. This issue is not worthy of the Court's review. Indeed, this Court has never granted certiorari to review a court of appeals' refusal to issue a writ of mandamus overturning an interlocutory order granting or denying class certification.

In its petition, Home Depot virtually ignores the procedural posture of this case, and defines the questions presented to the Court as if the Ninth Circuit had issued an opinion upholding a final order in this case. It did not. There is no final order below, and the Ninth Circuit has not issued an opinion in this case.

Even if there was an appealable, final order in this case, the issues Home Depot describes in its petition would still be unworthy of this Court's review. Not a single court of appeals has yet addressed the question whether the traditional practice of bifurcating liability and damages issues in a Title VII class action now violates the Seventh Amendment because the 1991 Civil Rights Act provides a right to a jury trial. The other question which Home Depot raises in its petition – whether certification of a Title VII class action under Rule 23(b)(2) violates the due process rights of class members – was not raised in either court below. Home Depot

cannot properly raise the due process issue in this Court, because it has no standing to represent the interests of class members. Home Depot thus seeks the Court's review of one issue that has not even been addressed by a court of appeals, and another issue which Home Depot has no standing to raise and which was not addressed below.

The most perplexing aspect of Home Depot's petition for certiorari, however, is its failure to acknowledge that the issues it raises are purely hypothetical. Home Depot's Seventh Amendment claim will become ripe if, and only if, all three of the following events occur: (1) Home Depot loses the liability phase of the trial and is found guilty of classwide discrimination; (2) the district court certifies the damages phase of the trial and decides that a different jury or juries should hear the damages phase; and (3) the district court allows the jury in the damages phase to reconsider issues already determined by the jury in the liability phase. Home Depot's due process claim will become ripe if, and only if, these events occur: (1) Home Depot loses the liability phase of the trial and is found liable for classwide discrimination; (2) the district court certifies the damages phase of the trial under Rule 23(b)(2) instead of Rule 23(b)(3), thereby denying class members the right to opt out of the monetary relief; and (3) a class member chooses to challenge the final order or settlement agreement.

None of the foregoing events has occurred, and the district court has given Home Depot no reason to believe that they necessarily will. Yet, until all of those events have occurred, Home Depot's stated concerns that different "follow up" juries will be empaneled in the damages phase, and that class members will not be allowed to opt

out of the monetary relief, merely invite this Court to speculate about future events.

Simply stated, Home Depot's petition for writ of certiorari requests this Court to engage in piecemeal appellate review of errors allegedly committed in interlocutory rulings by a district court, which are purely hypothetical and implicate no split among the circuits, without even the benefit of an opinion from the court of appeals. Home Depot's extraordinary request should be denied.

I.

THE QUESTION WHETHER THE NINTH CIRCUIT ERRED IN DENYING MANDAMUS IS NOT WORTHY OF THE COURT'S REVIEW.

The standards governing the exercise of a federal court's discretion in granting and denying mandamus petitions are well settled and uncontroverted. Under these standards, the Ninth Circuit was more than justified in denying Home Depot's request for the extraordinary remedy of mandamus.

A. The Standards for Issuance of a Writ of Mandamus Are Well Established by this Court.

This Court has long recognized that the remedy of mandamus is "among the most potent weapons in the judicial arsenal," and should be invoked only in extraordinary situations. *Will v. United States*, 389 U.S. 90, 95 (1967); *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34-35 (1980). Traditionally, the writ of mandamus has been used in the federal courts "only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so."

Will, 389 U.S. at 95, quoting *Roche v. Evaporated Milk Ass'n.*, 319 U.S. 21, 26 (1943). The extraordinary writs do not reach cases in which "the most that can be claimed . . . is that [a judge] may have erred in ruling on matters within his jurisdiction." *Id.* at 104. Only exceptional circumstances, "amounting to a judicial usurpation of power, will justify the invocation of this extraordinary remedy." *Allied Chem.*, 449 U.S. at 36.

The reasons for the "chary authorization" of mandamus as an extraordinary remedy are well established. *See, e.g., Allied Chem.*, 449 U.S. at 36. The use of mandamus has the "unfortunate consequence of making a district court judge a litigant, and it indisputably contributes to piecemeal appellate litigation." *Id.* It has been Congress' determination since the Judiciary Act of 1789 that as a general rule appellate review should be postponed until after final judgment has been rendered by the trial court. *Will*, 389 U.S. at 96. Accordingly, "a judicial readiness to issue the writ of mandamus in anything less than an extraordinary situation would run the real risk of defeating the very policies sought to be furthered by [the] judgment of Congress." *Kerr v. United States Dist. Ct.*, 426 U.S. 394, 404 (1976).

In order to ensure that the writ of mandamus is issued only in extraordinary circumstances, this Court requires that the party seeking mandamus demonstrate that it has no other adequate means to attain relief, and that its "right to issuance of the writ is clear and indisputable." *Allied Chem.*, 449 U.S. at 36 (internal cites omitted). The decision whether to issue the writ under these standards is largely a matter of discretion with the court to which the petition is addressed. *Kerr*, 426 U.S. at 404.

B. The Ninth Circuit Did Not Abuse Its Discretion by Denying the Petition for Writ of Mandamus.

The Ninth Circuit did not abuse its discretion by denying Home Depot's petition for writ of mandamus. The two requirements for issuance of the writ of mandamus – that the party have no other adequate means to attain relief, and that its right to the writ be "clear and indisputable" – were plainly not met in this case. *Allied Chem.*, 449 U.S. at 36.

Home Depot has other means to attain relief, as it is free to seek review of the class certification order on direct appeal after a final judgment is entered. *See, e.g., Allied Chem.*, 449 U.S. at 37 (ordering of a new trial did not justify the issuance of mandamus, because "[a] litigant is free to seek review of the propriety of [the] order on direct appeal after a final judgment has been entered"). Home Depot is also free to seek modification of the class certification order in the district court if future events require reconsideration of that decision.[4]

In addition, Home Depot's right to the writ of mandamus was far from "clear and indisputable." The district court did not usurp judicial power or refuse to exercise its jurisdiction when it should have. *See, e.g., Kerr*, 426 U.S. at 403. Nor did the district court engage in a pattern

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[4] Rules 23(c)(1) and 23(d)(1) grant the district court the authority to alter or amend a class certification order, and to make appropriate procedural orders to assure fairness to the parties and manageability of the action. Thus, Home Depot may seek relief from the district court on the ground that new circumstances or legal developments require modification of the order, or it may seek review of the class certification order on direct appeal from a final order.

of blatantly unlawful conduct warranting immediate intervention by an appellate court. *Cf. LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957). To the contrary, the district court carefully considered the briefs submitted by both parties, concluded that certification of the liability phase of the trial was appropriate, and decided to bifurcate the trial to enhance its manageability – acts which were well within its jurisdiction. As a result, the most that can be said of Home Depot's mandamus petition is that it alleges the district court erred on matters within its jurisdiction. However, this Court has repeatedly made clear that the extraordinary writs do not reach such cases. *See, e.g., Will*, 389 U.S. at 104.

Given that mandamus is not appropriate to cure erroneous rulings by a trial court, mandamus is clearly not appropriate where, as here, a party raises purely hypothetical issues. In this case, the district court has not yet certified the damages phase of the trial, or determined whether the same jury or different juries will hear the damages phase if Home Depot is found liable for classwide gender discrimination. If Home Depot wins the liability phase of the trial, there will be no damages phase and no possibility that another jury will be involved in this case. If Home Depot loses the liability phase of the trial, the district court will still have to decide whether the same jury or different juries should consider the damages issues, and whether the damages phase should be certified under Rule 23(b)(2), or under Rule 23(b)(3), which provides class members the right to opt out of monetary relief. Thus, Home Depot's claim that the Seventh Amendment prohibits a different jury from considering the damages issues, as well as its claim that class members' due process rights will be violated if they are

not provided the right to opt out of the damages phase, are hypothetical and not ripe for review. The Ninth Circuit did not abuse its discretion by declining to review, on a petition for writ of mandamus, an interlocutory order presenting issues that are not even ripe.

C. There Is No Merit to Home Depot's Claim that Mandamus Should Be Routinely Available to Defendants Challenging Class Certification Orders.

Home Depot does not argue in its petition that the Ninth Circuit abused its discretion by failing to comply with the governing standards when denying the mandamus petition. Instead, Home Depot argues that an exception should be made to the well-established rules governing mandamus whenever a defendant seeks review of a class certification order. According to Home Depot, writs of mandamus should be routinely granted to defendants who wish to challenge class certification orders because "the reality is that these important cases and issues *must* be reviewed on mandamus or interlocutory review if they are to be reviewed at all." Pet'r Br. at 28 (emphasis in original). Home Depot claims such review is necessary because defendants face intense pressure to settle large class actions.

Home Depot's arguments were rejected by this Court long ago. In *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), this Court refused to create an exception to the final order rule which would allow interlocutory appeal of class certification orders. In that case, the petitioner argued that a court's order denying class certification should be subject to interlocutory review, because most plaintiffs "may find it economically imprudent to pursue

his lawsuit to a final judgment and then seek appellate review of an adverse class determination." *Id.* at 470-71. That argument was rejected.

The Court acknowledged that intense economic pressures "may induce a plaintiff to abandon his individual claim" rather than pursue a final judgment and appeal, but concluded that "the appealability of any order entered in a class action" must be determined by the "same standards that govern appealability in other types of litigation." 473 U.S. at 471.[5] The Court emphasized that Congress, not the Court, should make the exception to the final order rule suggested by petitioner, if such an exception is warranted. *Id.* at 473. The Court also observed that an argument for appealability based on economic pressures could also be made by defendants in class actions, and that such an argument would be equally devoid of merit:

> [W]hether to certify, and if so, how large the class should be – will often be of critical importance to defendants as well. Certification of a large class may so increase the defendant's potential damages liability and litigation costs

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[5] The principle articulated by the Court in *Coopers & Lybrand*, 437 U.S. at 471, was not new or novel. The federal courts have long recognized that the decision to grant interlocutory review should not be influenced by a party's claim that denial of review would result in settlement or financial hardship. *See, e.g., Allied Chem.*, 449 U.S. at 37 (despite expense involved in litigating a new trial, ordering of new trial does not justify issuance of mandamus); *In re Master Key Antitrust Litig.*, 528 F.2d 5, 14 (2nd Cir. 1975) (ordering of separate trials on the liability and damage issues not immediately appealable despite argument that the cost of conducting separate "mini trials" would be prohibitive and would force the defendants into an unfavorable settlement).

> that he may find it economically prudent to settle and to abandon a meritorious defense. Yet the Courts of Appeals have correctly concluded that orders granting class certification are interlocutory. Whatever similarities or differences there are between plaintiffs and defendants in this context involve questions of policy for Congress.

Id. at 477.

In view of this Court's clear statement on the issue in *Coopers & Lybrand*, there is no merit to Home Depot's claim that the Ninth Circuit should have granted its mandamus petition, despite the interlocutory nature of the order below, simply because Home Depot may feel pressured to settle this case.[6]

D. Home Depot's Hypothetical Seventh Amendment Claim Does Not Justify Interlocutory Review.

Home Depot's argument that this Court should grant interlocutory review of this case "in light of the important Seventh Amendment rights at stake" does not withstand scrutiny. Pet'r Br. at 28. No Seventh Amendment rights are currently at stake, because the district court has not yet determined whether it will even certify the damages phase of the trial. If it does certify the damages phase, it is not clear that a different jury will be empaneled for that phase; nor is it likely that a different jury in the damages

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[6] Home Depot's argument is particularly inappropriate in the Title VII context, as this Court has recognized the strong public policy in favor of settling Title VII claims, due to Congress' "strong preference" for "encouraging voluntary settlement of employment discrimination claims." *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981).

phase would be permitted to revisit issues which were already decided in the liability phase.

Home Depot cites two Supreme Court cases for the proposition that "[t]his Court has not hesitated to grant certiorari at an interlocutory stage" where a violation of the Seventh Amendment has been alleged. *See* Pet'r Br. at 28, citing *Dairy Queen Inc. v. Wood*, 369 U.S. 469, 472 (1962); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510-11 (1959). Neither of those cases is on point. In both cases, jury trials were denied to the petitioners, in clear violation of the Seventh Amendment. In this case, a jury trial was *granted* to Home Depot on the question of classwide liability, and the district court has given no indication that it intends to deny Home Depot a proper jury trial on damages.

Home Depot's claim is that the district court, by bifurcating the trial, potentially could empanel a different jury to hear the damages phase and, if that occurred, the Seventh Amendment could be violated if the liability and damages issues are not properly severed. However, that is a bifurcation issue, not an issue of whether Home Depot is entitled to a jury trial. It is well settled that, although bifurcation orders often implicate the Seventh Amendment, a court order bifurcating a case for separate trials is not subject to interlocutory review. *See, e.g., Travelers Indem. Co. v. Miller Mfg. Co.*, 276 F.2d 955 (6th Cir. 1960); *Master Key*, 528 F.2d at 14. Indeed, if every bifurcation order qualified for immediate appellate review, courts of appeals would be buried in requests to review interlocutory orders. Such a result would clearly conflict with the "policy against piecemeal review, and would leave that policy at the mercy of any court of appeals which chose to disregard it." *Allied Chem.*, 449 U.S. at 37.

In sum, there is no justification for granting Home Depot's petition for certiorari seeking review of the Ninth Circuit's refusal to issue a writ of mandamus in this case. The standards governing the writ of mandamus are well established, and the Ninth Circuit did not err in interpreting them. Indeed, the orders about which Home Depot complained in the Ninth Circuit were interlocutory and the issues it described were purely hypothetical. The issues have not ripened since then. Home Depot has not yet been found guilty of classwide discrimination, and the district court has not yet decided whether to certify the damages phase under Rule 23(b)(2) or Rule 23(b)(3), if at all. In addition, no decision has yet been made regarding whether the same jury or different juries will resolve the damages issues, if Home Depot is found liable for classwide discrimination. As a result, granting certiorari would require review of issues which are not close to being ripe and consideration of possible errors which could easily be cured on direct appeal in the ordinary course of litigation. For these reasons, the Court should decline to grant review of the case in this procedural posture, and should adhere to the long-standing rule against piecemeal appeals articulated by Congress and this Court.

II.

THE SEVENTH AMENDMENT QUESTION PRESENTED BY HOME DEPOT IS NOT WORTHY OF CERTIORARI.

Even if the Ninth Circuit had issued an opinion in this case from an appealable final order addressing the issues presented in Home Depot's petition, Home Depot's argument that the district court's bifurcation of liability

and damages issues violates the Seventh Amendment would not be worthy of certiorari. There is no split between the circuits regarding the question whether bifurcation of Title VII class actions is proper. That issue was resolved by this Court twenty years ago in *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977), and has not been called into question by the 1991 Civil Rights Act.

A. Bifurcation of Title VII Class Actions Has Been Well Established Since this Court's Decision in Teamsters.

Home Depot virtually ignores the seminal decision in *Teamsters*, 431 U.S. at 358-62, in which this Court expressly determined that Title VII class actions such as this one should be separated into two stages addressing liability and damages. *Teamsters* succinctly explains:

> The plaintiff[s'] initial burden is to demonstrate that unlawful discrimination has been a regular procedure or policy followed by an employer. . . . At the initial, 'liability' stage of a pattern or practice suit the [plaintiff] is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy. Its burden is to establish a prima facie case that such a policy existed. . . . If an employer fails to rebut the inference that arises from the [plaintiffs'] prima facie case, the trial court may then conclude that a violation has occurred and determine the appropriate remedy. . . . When the [plaintiff class] seeks individual relief for the victims of the discriminatory practice, a district court must usually conduct additional proceedings after the

> liability phase to determine the scope of individual relief. . . . The proof of the pattern or practice supports an inference that any particular employment decision . . . was made in pursuit of that policy. The [plaintiff] need only show that an alleged individual discriminatee unsuccessfully applied for a job and therefore was a potential victim of the proved discrimination. . . . [T]he burden then rests on the employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons.

Id. at 360-62, citing *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 771-72 (1976).

Importantly, *Teamsters* clarified that the facts determined at the first stage may *not* be reconsidered during the second stage. "[T]he question of individual relief does not arise until it has been proved that the employer has followed an employment policy of unlawful discrimination. *The force of that proof does not dissipate at the remedial phase of the trial.*" 431 U.S. at 361-62 (emphasis added).[7]

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[7] Numerous courts have successfully followed the *Teamsters* procedure for trying Title VII class actions. *See Domingo v. New England Fish Co.*, 727 F.2d 1429, 1434 (9th Cir.), *modified on other grounds*, 742 F.2d 520 (9th Cir. 1984); *Sledge v. J.P. Stevens & Co.*, 585 F.2d 625, 637 (4th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979); *Wells v. Meyer's Bakery*, 561 F.2d 1268, 1277 (8th Cir. 1977); *United States v. United States Steel Corp.*, 520 F.2d 1043, 1053-56 (5th Cir. 1975), *cert. denied*, 429 U.S. 817 (1976); *see also, Manual for Complex Litigation, Third* § 33.54 (1995) ("Employment discrimination class actions have commonly been tried in separate stages under Rule 42(b)."); Herbert Newberg & Alba Conte, *Newberg on Class Actions*, § 24-123, p. 24-414 (3d ed. 1992) ("The majority of courts have held the bifurcation of class liability and relief phases of Title VII suits to be an appropriate means of litigating employment discrimination claims.").

In accordance with the Court's direction in *Teamsters*, the district court bifurcated this Title VII class action into separate stages addressing classwide liability and damages. *See supra* pp. 2-3.[8] Bifurcation is also permitted under Rule 42(b), which gives courts the authority to separate issues for trial when "separate trials will be conducive to expedition and economy."[9] The district court's order thus comports with the procedure established by this Court and the Federal Rules of Civil Procedure for trying Title VII class actions.[10]

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[8] Home Depot summarily asserts that the class certification order "is a far cry from the customary bifurcation of all liability issues from all damages issues," Pet'r Br. at 10, but fails to explain how the district court's bifurcation varies at all from the separation of issues ordered in *Teamsters*. *See supra* pp. 2-3. (describing clear bifurcation of liability and damages in district court's order).

[9] The district court's bifurcation order was also within the authority granted by Rule 23(d)(1), which allows courts to make appropriate orders concerning the procedure by which class actions are litigated, including "determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument," and Rule 16(c), which allows the district court to make necessary orders governing the conduct of trials.

[10] The decision whether to bifurcate a trial on the issues of liability and damages lies in the discretion of the district court. *See, e.g., Angelo v. Armstrong World Indus.*, 11 F.3d 957, 964 (10th Cir. 1993); *Helminski v. Ayerst Lab.*, 766 F.2d 208, 212 (6th Cir.), *cert. denied*, 474 U.S. 981 (1985).

B. The District Court's Bifurcation Order Does Not Threaten Home Depot's Seventh Amendment Rights.

Home Depot argues that the 1991 Civil Rights Act, which provides the right to a jury trial in Title VII cases seeking damages, rendered unconstitutional the traditional practice of bifurcating Title VII class actions. According to Home Depot, the Seventh Amendment prohibits different juries from hearing the liability and damages phases of a Title VII class action. In making this argument, Home Depot assumes that a different jury will hear the second phase of this case and that the trial court will have to allow the new jury to revisit the issues determined by the first jury. Neither assumption is correct.

In *Gasoline Products Co. v. Champlin Ref. Co.*, 283 U.S. 494 (1931), this Court held that it is consistent with the Seventh Amendment to allow separate juries to hear different issues, so long as the issues tried to the separate juries are "distinct and separable," such that the second jury will not revisit issues determined by the first jury. 283 U.S. at 499. In *Teamsters*, the Court explained that the issue of liability can and should be cleanly severed from issues of damages. *See supra* Section II.A. Indeed, employment discrimination cases brought under 42 U.S.C. § 1981 alleging intentional discrimination on the basis of race have *always* carried the right to a jury trial and are often certified as class actions and bifurcated.[11] Home Depot

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[11] *See, e.g., Bailey v. Great Lakes Canning, Inc.*, 908 F.2d 38, 39 (6th Cir. 1990) (class action brought under 42 U.S.C. § 1981 certified and trial bifurcated into liability and damages phases); *Salinas v. Roadway Exp., Inc.*, 735 F.2d 1574, 1576 (5th Cir. 1984)

cites no case finding that bifurcation of class actions brought under 42 U.S.C. § 1981 violates the Seventh Amendment. Thus, Home Depot's argument that liability and damages issues in employment discrimination class actions are not "distinct and severable" issues is put to rest by *Teamsters*.

Home Depot hopes to avoid this result by incorrectly applying the framework for an *individual* employment discrimination case to this class action. Home Depot cites *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), for the proposition that the jury in the damages phase must reconsider the "totality of the evidence," including all of the evidence regarding classwide discrimination considered by the jury at the liability stage. Pet'r Br. at 11-13. This is incorrect. *St. Mary's* clarifies the procedure for trying an individual employment discrimination case, which is clearly distinct from the procedure in Title VII class actions. *Compare Teamsters*, 431 U.S. at 358-63 (governing Title VII class actions), *with McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973) (governing individual discrimination claims). This Court has repeatedly distinguished the procedures used in Title VII class actions from those applied in individual cases. *See Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 868-72 (1984); *Teamsters*, 431 U.S. at 358-60; *Franks*, 424 U.S. at 751.[12]

(same); *Domingo*, 727 F.2d at 1433-34 (same). Congress directed courts applying the 1991 Civil Rights Act to be guided by the jurisprudence developed in 42 U.S.C. § 1981 cases. H.R. Rep. No. 102-40 Part II, 102nd Cong. (May 17, 1991).

[12] *St. Mary's* explains that, in an individual Title VII disparate treatment case, the plaintiff must carry the burden of establishing that the defendant discriminated against him or her under the "totality of the circumstances." 509 U.S. at 505-10.

Home Depot paints a picture of how two of the claims in this case will be litigated, a picture incorrectly based on the *St. Mary's* model for trying individual cases. *See* Pet'r Br. at 12-14. The assumption in these examples – that Home Depot will be allowed to raise issues in the damages phase that have already been determined in the liability phase – was flatly rejected in *Teamsters*. 431 U.S. at 361-62. In *Teamsters*, this Court stated that, at the damages phase, "the employer cannot . . . claim that there is no reason to believe that its individual employment decisions were discriminatorily based; it has already been shown to have maintained a policy of discriminatory decisionmaking." *Id.* at 363.[13] The only issue in the damages phase is whether particular class members were harmed by the defendant's policy and practice of discrimination. In making this determination, each class member will be entitled to a presumption that adverse decisions

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This holding is inapplicable to the damages phase of a Title VII class action, where the defendant's liability for classwide discrimination has already been proven at the first stage and the individual class member is entitled to a presumption during the damages phase that he or she was injured by this discriminatory conduct. *See Teamsters*, 431 U.S. at 461-62; *see also supra* Section II.A.

[13] *See also, Franks*, 424 U.S. at 751-72 (despite finding after first stage of pattern or practice Title VII class action that defendant had engaged in classwide discrimination, district court refused to grant any relief because each individual class member had not demonstrated that he or she was the victim of discrimination; this Court reversed, finding that "by demonstrating the existence of a discriminatory hiring pattern and practice" the plaintiffs had demonstrated a prima facie case against individual class members; burden at that point shifted to the employer to show that certain individual class members were not victims of discrimination).

concerning her initial job assignment and rate of pay were made "in pursuit" of the discriminatory policies and practices proved at the first stage. Home Depot will not be allowed to rebut this presumption by re-litigating the question whether it is guilty of classwide discrimination.[14] As explained in *Teamsters*, "the force of that proof does not dissipate during the remedial phase of the trial." 431 U.S. at 361-62.[15]

C. There Is No Split Between the Circuits Concerning Whether Title VII Class Actions Can Be Bifurcated Without Violating the Seventh Amendment.

Home Depot's argument that the circuits are split on the question whether bifurcation of Title VII class actions violates the Seventh Amendment is groundless. Home

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[14] Home Depot also argues that, pursuant to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650 (1989), it will be allowed to introduce different statistics at the second stage than were used in the first stage to establish classwide discrimination. Pet'r Br. at 12 n.3. This argument, again, contravenes the accepted procedure for trying pattern and practice cases. *Wards Cove* clarifies the type of statistics that can be introduced during the *first* stage to demonstrate classwide discrimination. 490 U.S. at 650. It says nothing about whether, or how, statistical evidence may be properly used during the second stage.

[15] If Home Depot's argument were accepted, certification of Title VII class actions alleging intentional discrimination would always be unconstitutional, because the bifurcation mandated by *Teamsters* would always violate the Seventh Amendment. *See* Pet'r Br. at 19. This result would be contrary to Congress's intent in adopting the 1991 Civil Rights Act, which was to "strengthen existing protections and remedies under the federal civil rights laws to provide more effective deterrents and adequate compensation for victims of discrimination." H.R. Rep. No. 102-40 Part II, 102nd Cong. (May 17, 1991).

Depot asserts that the Ninth Circuit's decision in *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227 (9th Cir. 1996), conflicts with Seventh Circuit's decision in *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, *cert. denied*, 116 S. Ct. 184 (1995), and the Fifth Circuit's decision in *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996). However, these cases involve mass tort product liability claims, and thus do not raise issues relevant to whether Title VII class actions can properly be bifurcated. Further, contrary to Home Depot's depiction, the *Valentino* court did not even reach the Seventh Amendment issue, stating that the "constitutional issues were never squarely presented to the district court." 97 F.3d at 1230.[16]

The question whether it is appropriate to bifurcate a case under Rule 42(b) is highly case-specific, as it requires the trial court to assess the types of claims, defenses and evidence that will arise at each stage in order to decide whether the issues can be severed in accordance with *Gasoline Products*.[17] Mass tort cases are therefore not

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[16] Home Depot also asserts that the Ninth Circuit took an "inhospitable view" of the Seventh Amendment in *Arthur Young & Co. v. United States Dist. Ct.*, 549 F.2d 686, 696 (9th Cir.), *cert. denied*, 434 U.S. 829 (1977), simply because it found that class issues in a securities case could be cleanly severed from separate defenses that might be raised to defeat claims of individual class members. *Id.* at 693-94. A finding that the Seventh Amendment is not violated under the specific facts of a single case hardly represents an "inhospitable view" towards that constitutional provision.

[17] *See In re Bendictin Litig.*, 857 F.2d 290, 307 (6th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989) ("Neither Rule 42(b) nor the [Advisory Committee Notes] give[ ] any precise guidelines for the trial judge in considering the propriety of ordering separate trials, probably because of the wide variety of circumstances in

instructive to the question whether Title VII class actions can properly be bifurcated because they involve entirely different legal questions and types of proof. In deciding whether it is constitutional to bifurcate a product liability class action, for example, a court must often resolve whether the determination of a defendant's negligence to the class, a "common" issue to be tried at the first stage, can be severed from individual issues such as comparative negligence, which would be determined at the second stage. The determination of comparative negligence requires the trier of fact to consider whether the plaintiff's own conduct contributed to his injury, thus potentially requiring a comparison between the plaintiff's and defendant's negligence. *See, e.g., Castano*, 84 F.3d at 749-50; *Rhone-Poulenc*, 51 F.3d at 1303. These concerns are not relevant to the bifurcation of Title VII class actions, which involve entirely different claims, defenses and evidence.[18]

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which it might come into play. Consequently, courts have adopted a case-by-case approach."); *Southern Ry. Co. v. Tennessee Valley Authority*, 294 F.2d 491, 494 (5th Cir. 1961) ("Essentially, the question [of separation of trials] is one that seems to depend on the facts of each case, a matter to be determined by the trial judge exercising sound discretion.").

[18] Home Depot cites several other cases which do not involve bifurcation of Title VII class actions and thus are not indicative of a split between the circuits. *See Franchi Const. Co. Inc. v. Combined Ins. Co. of America*, 580 F.2d 1, 2 (1st Cir. 1978) (in individual breach of contract action, district court improperly ordered a second jury to address many of the same issues heard by the first jury after realizing it had ruled erroneously on the measure of plaintiffs' damages); *McDaniel v. Anheuser-Busch, Inc.*, 987 F.2d 298, 305 (5th Cir. 1993) (in an individual contractual indemnity case, court determined that tort and contract claims could be tried to separate juries); *see also, Central*

Home Depot cites two district court decisions that raise concerns about whether certification of Title VII class actions under the 1991 Civil Rights Act creates a potential violation of the Seventh Amendment. *See McKnight v. Circuit City Stores, Inc.*, 168 F.R.D. 550, 552-53 (E.D. Va. 1996); *Celestine v. Citgo Petroleum Corp.*, 165 F.R.D. 463, 470-71 (W.D. La. 1995).[19] Two isolated district court decisions do not represent a split between the circuits requiring resolution by this Court.[20] *See* Robert L.

Wesleyan College v. W.R. Grace & Co., 6 F.3d 177 (4th Cir. 1993) (products liability); *In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989) (products liability); *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988) (products liability); *In re School Asbestos Litig.*, 789 F.2d 996 (3rd Cir.), *cert. denied*, 479 U.S. 915 (1986) (products liability); *Alabama v. Blue Bird Body Co.*, 573 F.2d 309 (5th Cir. 1978) (securities); *In re Copley Pharmaceutical, Inc.*, 161 F.R.D 456 (D. Wyo. 1995) (products liability).

[19] *Celestine v. Citgo Petroleum Corp.* is currently under appeal in the Fifth Circuit. *See* Resp't App. at 1a.

[20] Home Depot cites four other district court decisions analyzing motions for class certification in Title VII class actions under the 1991 Civil Rights Act. None of these courts raised concerns about the Seventh Amendment. In three of these cases, the court denied class certification because, after a detailed, fact-specific analysis, it found that the plaintiffs could not show the typicality and commonality required by Rule 23. *See Brooks v. Circuit City Stores, Inc.*, 1996 U.S. Dist. LEXIS 9869 (D. Md. 1996); *Appleton v. Deloitte & Touche LLP*, 168 F.R.D 221 (M.D. Tenn. 1996); *Zapata v. IBP, Inc.*, 167 F.R.D. 147 (D. Kan. 1996). One court granted class certification. *Shores v. Publix Super Markets, Inc.*, 1996 WL 407850 (M.D. Fla. Mar. 12, 1996). These district court cases, on the highly case-specific question of whether a particular class fulfills the requirements of Rule 23, do not represent a split in the circuits as to whether Title VII class actions can ever be certified under the 1991 Civil Rights Act.

Stern et al., *Supreme Court Practice* 178-79 (7th ed. 1993). Further, to the extent these district courts determined in error that the Seventh Amendment prohibits class certification of Title VII class actions seeking damages, the appellate court, not this one, is the proper forum to correct these errors. *Id.* at 193.

III.

THIS CASE SHOULD NOT BE HELD PENDING THE COURT'S DECISION IN *ADAMS V. ROBERTSON.*

In a last-ditch attempt to capture the attention of this Court, Home Depot argues that this case should be "held" or "substituted" for *Adams v. Robertson*, 676 So. 2d 1265 (Ala. 1995), *cert. granted*, 117 S. Ct. 37 (1993). For the reasons stated below, the Court should decline Home Depot's invitation to delay this litigation unnecessarily.

Home Depot claims that this Court is interested in resolving the questions presented in *Adams* and *Ticor Title Ins. Co. v. Brown*, 114 S. Ct. 1359 (1994), and that the interests of justice would be best served if the Court granted review of a case that raised the issue in *Adams* as well as the issue in *Ticor*. Home Depot may be right that

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Home Depot also mentions two other lawsuits in which it has been sued for classwide gender discrimination. *See Griffin v. Home Depot, Inc.*, 168 F.R.D. 187 (E.D. La. 1996); *Tortajada v. Home Depot, Inc.*, No. 96-2927 (D.N.J.). In *Griffin*, the district court denied Home Depot's motion to dismiss the complaint's class allegations, and stated in dicta that certification of the class under Rule 23(b)(3), rather than Rule 23(b)(2), might be appropriate. 168 F.R.D. at 191-92. The question whether the class should be certified and, if so, under what provision, has not yet been briefed in that case. This action is the only suit against Home Depot that has, as of yet, progressed to the class certification stage.

review of such a case would be desirable; however, it is wrong that this petition provides an appropriate vehicle for resolution of the questions presented in those cases.

To begin with, Home Depot did not raise below the issue which it claims is related to the questions presented in *Adams* and *Ticor*. Home Depot argues for the first time in its petition for certiorari that certification of the class under Rule 23(b)(2) violates the Fifth Amendment due process rights of class members, because Rule 23(b)(2) does not afford class members the right to opt out of the monetary relief. Home Depot argued in its briefs to the district court and the Ninth Circuit that certification under Rule 23(b)(2) was inappropriate, but it never claimed that certification under that provision is unconstitutional. As a result, there is no decision by the court of appeals or the district court regarding Home Depot's Fifth Amendment due process claim. This Court should not grant review of an issue which the courts below have not had the opportunity to consider or address.

Even if the due process issue had been raised below, Home Depot could not properly raise it in this Court, because Home Depot does not have standing to represent the interests of class members. Home Depot may assert its own legal interests before this Court, but it does not have standing to vindicate the rights of others. *See, e.g., Baker v. Carr*, 369 U.S. 186, 204 (1962) (standing requirement is aimed at "assur[ing] that concrete adverseness which sharpens the presentation of [the] issues upon which the court so largely depends").

In a footnote, Home Depot cites *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), for the proposition that it does have standing to raise its opponents' constitutional

rights. In *Shutts*, the Court held that, because the defendant "has a distinct and personal interest in seeing the entire plaintiff class bound by res judicata," it had standing to raise the question whether the district court had personal jurisdiction over the entire plaintiff class. *Id.* at 806. By contrast, in this case, Home Depot has no legitimate interest in ensuring that class members can "opt out" of monetary relief, other than its potential interest in reducing the size of the plaintiff class – an interest which is antagonistic to the class and which certainly cannot confer standing upon Home Depot to represent the interests of class members. *See, e.g., Baker*, 369 U.S. at 204.[21] Therefore, contrary to Home Depot's suggestion, this case cannot properly be "substituted" for *Adams* because Home Depot lacks standing to assert the due process rights of class members in this Court.

Significantly, even if Home Depot had standing to raise the due process issue and had raised the issue below, this case still should not be "substituted" or "held" for *Adams* because *Adams* is not relevant to this case. The issue in *Adams* is whether approval of a mass tort settlement binding on a Rule 23(b)(2) class, with no opt out right, violates due process when all class members suffered individual monetary damages but the settlement agreement provided no compensation to the majority of class members whose claims were released. This case, in contrast, is a Title VII class action in which only the liability phase of the trial has been certified

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[21] In both *Adams* and *Ticor* the petitioners before the Court had standing because they were class members, not defendants, who objected to class certification and approval of the settlement order in both the trial and appellate courts. *See Adams*, 676 So. 2d at 1268; *Ticor*, 114 S. Ct. at 1362-1363.

under Rule 23(b)(2). It remains to be determined whether the damages phase of the trial will be certified under Rule 23(b)(2) or Rule 23(b)(3), which provides class members the right to opt out of monetary relief. Thus, the issue in *Adams* is not relevant here, since the class members in this case have not been denied the right to opt out of the monetary relief, and may well be granted that right if the district court certifies the damages phase of the trial under Rule 23(b)(3).

Home Depot's contention that the Court's forthcoming decision in *Adams* will be relevant to whether the district court properly certified the liability phase of this trial under Rule 23(b)(2) is simply wrong. There is no question that the liability phase, which addresses "liability and relief applicable to the class as a whole, including declaratory and injunctive relief, and whether the defendant is liable for punitive damages," is properly certified under Rule 23(b)(2). Pet'r App. at 12a. Home Depot has not suggested otherwise. Home Depot's stated concern is that class members will not be allowed to opt out of the individual monetary relief, an issue which will be decided in the damages phase.

The Court's decision in *Adams* may become relevant to this case if the following events occur: (a) Home Depot loses the liability phase of the trial, (b) the district court certifies the damages phase of the trial under Rule 23(b)(2), instead of Rule 23(b)(3), (c) a final order is entered, and (d) a class member chooses to challenge the order. *Adams* could also become relevant in the unlikely event that a settlement agreement is reached in which most of the class members' monetary claims are extinguished and no right to opt out of the monetary relief is provided. Unless and until the foregoing events occur,

the question whether class members will be bound by a final order or settlement agreement that does not allow them to opt out of the monetary relief is completely hypothetical and calls for speculation about future factual developments and potential court orders. There is no reason to engage in such speculation, because regardless of whether a final order is entered or a settlement agreement is eventually reached, class members will be free to challenge those decisions on due process grounds in the district court and the court of appeals, just as the petitioners did in *Adams* and *Ticor*.

Finally, there is no reason to "hold" Home Depot's petition, even if *Adams* were relevant to any of the issues which have been decided in this case. This Court generally "holds" petitions to prevent an improper final judgment from being secured which could be corrected if the case was held until the Court issues an opinion in a related case. Stern et al., *supra* 243-44. After the related case is decided, the Court can remand the "held" case to the lower court for reconsideration in light of the new opinion. This procedure is both unnecessary and unwise, however, when a party files a petition for writ of certiorari from an interlocutory order which can be modified in the district court and reviewed on appeal.

If anything in the *Adams* decision becomes relevant to the issues in this case at any stage of this litigation, Home Depot may request the district court to modify or amend the class certification order in light of that development in the law. *See* Fed. R. Civ. P. 23(c)(1), 23(d)(1). Similarly, after a final order has been entered, Home Depot can appeal the order to the Ninth Circuit on the ground that *Adams*, or any other opinion which is issued between now

and the date of Home Depot's appeal from final judgment, compels a different result. Accordingly, no judicial purpose will be served by holding this case for *Adams*, and it may result in further delay of this litigation, which has already been pending for more than two years. Respondents therefore respectfully request that Home Depot's petition be denied forthwith, rather than held pending the Court's decision in *Adams*.

CONCLUSION

Home Depot's petition for certiorari presents none of the bases for certification enumerated in Supreme Court Rule 10. The hypothetical issues it presents are not ripe for review and would require this Court to engage in inappropriate speculation about future events. For the reasons stated, Home Depot's petition for certiorari should be denied.

Respectfully submitted,

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Exhibit A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-30489

JAMES E. ALLISON, ET AL.

Plaintiffs – Appellants

JONATHAN ANDERSON; DANIEL COX; RUSSELL METOYER; HILLERY RANDELL; LEO P. REEDER

Intervenors – Plaintiffs – Appellants

v.

CITGO PETROLEUM CORP.

Defendant – Appellee

Appeal from the United States District Court
for the Western District of Louisiana, Lake Charles

(Filed Dec. 17, 1996)

ORDER:

IT IS ORDERED that appellants' motion to reinstate the appeal is granted.

/s/ James L. Dennis
JAMES L. DENNIS
UNITED STATES
CIRCUIT JUDGE

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(4)

Supreme Court, U.S.
FILED
FEB 7 1997
CLERK

No. 96-943

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

HOME DEPOT U.S.A., INC.,

Petitioner,

v.

VICKI BUTLER, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONER

Home Depot's petition for certiorari raised two issues on which the lower courts are in conflict: (1) whether the Seventh Amendment permits a court to certify a class action by subdividing liability issues between a "common issues" jury and numerous "follow-up" juries, and (2) whether Rule 23(b)(2) or the Due Process Clause permits the certification of claims for monetary relief without providing class members an opportunity to opt out of the class. Respondents suggest a number of procedural reasons why this Court should decline to consider the Seventh Amendment issues. These same objections, however, were raised and rejected by the Seventh Circuit in *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1294-95 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 184 (1995). Accordingly, rather than providing a reason to deny Home Depot's petition, respondents' arguments demonstrate that the Circuits are split not only on the merits of the Seventh Amendment issue, but also as to whether it should be addressed on mandamus. Respondents' procedural objections to the second question are wide of the mark. This case also involves the same issue as *Adams v. Robertson*, No. 95-1873, but in a superior posture.

I. THIS CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING THESE ISSUES.

Respondents contend that the fact that this case comes to the Court in a mandamus posture is a sufficient reason to deny Home Depot's petition. As respondents would have it, the Court need not even consider whether to address the important Seventh Amendment issues raised by the petition that would otherwise merit plenary review. There is no support in the law for respondents' rigid view. As Home Depot explained in its petition, although there are many areas of the law in which this posture would counsel hesitation, the judicial nullification of

jury trial rights under the Seventh Amendment in the class action context is emphatically not one of them.

Respondents' complaints about the appropriateness of mandamus as a vehicle for correcting a class certification order bifurcating a class action for trial were raised and rejected in *Rhone-Poulenc*. As the Seventh Circuit concluded, the vindication of Seventh Amendment rights is "a traditional office of the writ of mandamus," and as a practical matter, if these issues are not addressed at an interlocutory stage, they will not be addressed at all. 51 F.3d at 1298, 1303. Accordingly, when a class certification order improperly imperils a defendant's Seventh Amendment right to a jury trial, the "extraordinary remedy" of mandamus is appropriate and indeed essential. *Id.* at 1294-95.[1]

Respondents' principal response to the Seventh Circuit's conclusion is that considering such issues on mandamus will lead to the routine use of mandamus to review class certification orders in contravention of this Court's holding in *Coopers & Lybrand v. Westinghouse Broadcasting Co.*, 437 U.S. 463 (1978).[2] The Seventh Circuit anticipated and answered this concern as well, noting that even orders which are nonappealable under *Coopers & Lybrand* are reviewable on mandamus in "extraordinary cases" if the challenged order inflicts irreparable harm and "so far exceed[s] the proper

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[1] This Court has also recognized that mandamus is a proper means "of policing compliance with the procedural rules" in civil cases. *Will v. United States*, 389 U.S. 90, 100 n.10 (1967);

[2] Apparently unwilling to take on Home Depot's actual position, respondents have insisted on exaggerating and distorting it. Home Depot is not suggesting that "mandamus should be routinely available to defendants challenging class certification orders." Opp. 10. To the contrary, Home Depot has followed the Seventh Circuit in arguing that mandamus should be available to review certification orders only in limited circumstances. Respondents' alarmist rhetoric about undermining *Coopers & Lybrand* is applicable only to the straw man they have created, not to the position of either petitioner or the Seventh Circuit.

bounds of judicial discretion as to be legitimately considered usurpative in character." 51 F.3d at 1294-95 (citing *Kerr v. United States*, 426 U.S. 394, 403 (1976)).

The Seventh Circuit cautioned that mandamus is not an end run to seek interlocutory review of every certification order. Nonetheless, the court held that mandamus is warranted to overturn class certification orders in the narrow circumstances where: (i) a lower court certifies an otherwise uncertifiable class action by ignoring the dictates of the Seventh Amendment, *id.* at 1303; and (ii) where the improper certification order will eliminate any possibility for later appellate review because the hydraulic pressures of this ingenious procedural vise will force defendants to settle regardless of the merits of the case. *Id.* at 1298

Home Depot is identically situated. The District Court in this case certified an enormous class action -- with potential liability reaching many billions of dollars -- only by subdividing liability issues without regard to Home Depot's Seventh Amendment rights. As explained in *Rhone-Poulenc*, courts cannot stand idly by in these circumstances.[3]

In sum, respondents' position with respect to mandamus is flatly inconsistent with the Seventh Circuit's view in *Rhone-Poulenc*. That is perhaps not surprising, as one of respondents' law firms filed the petition for certiorari in *Rhone-Poulenc*, which focused on the mandamus issue. Far from demonstrating that the petition does not raise an issue worthy of plenary review, at best respondents have demonstrated an additional issue on which the Circuits are split -- the proper standard for mandamus review of class certification orders implicating

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[3] Respondents counter that this Court has expressed a preference for settlement, particularly in the Title VII context, citing *Carson v. American Brands Inc.*, 450 U.S. 79, 88 n.14 (1981). But a preference for settlement should not be distorted to sanction what Judge Friendly described as legalized "blackmail settlements." Henry J. Friendly, Federal Jurisdiction: A General View 120 (1973). This Court has never valued settlement as an end in itself, without regard to whether the settlement reflects the underlying merits of the legal dispute.

Seventh Amendment issues. Home Depot raises precisely the same claim that was addressed in *Rhone-Poulenc*, and thus would have been entitled to the requested relief in the Seventh Circuit, though apparently not in the Ninth. If the Court believes that there is anything to respondents' position with respect to mandamus, Home Depot would have no objection to expanding the questions presented to include a question expressly addressing the proper mandamus standard.[4]

II. THE CLASS CERTIFICATION ORDER VIOLATES HOME DEPOT'S SEVENTH AMENDMENT RIGHTS AND IS RIPE FOR REVIEW.

Home Depot clearly explained in its original petition how the class certification order here will require many separate "follow-up" juries to reconsider issues already decided by the class jury in the first phase of this litigation. *See* Pet. 9-14. In particular, Home Depot explained how the burden-shifting regime clarified in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), made it inevitable that follow-up juries would need to reconsider issues first addressed by the common-issues jury. Respondents attempt to disguise the radical nature of the District Court's order by describing it with familiar terms like "bifurcation," "liability phase," and "damages phase." But the

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[4] Although respondents acknowledge that this Court has granted certiorari to consider Seventh Amendment questions raised in a mandamus petition, *see, e.g.*, *Dairy Queen v. Wood*, 369 U.S. 469, 472 (1962), they attempt to dismiss these precedents by arguing, in effect, that not all Seventh Amendment rights are created equal. Opp. 13. In particular, respondents note that the Second and Sixth Circuits have held that the Seventh Amendment issues raised by bifurcation orders are not appropriate for judicial review. *Id.* The Seventh Circuit clearly took a different view in *Rhone-Poulenc*, and so, once again, rather than providing an argument against plenary review, respondents at best have identified another question on which certiorari should be granted.

procedural hydra created by the District Court is a far cry from the "traditional practice of bifurcating liability and damages issues." Opp. 4. Indeed, the District Court's procedure directly contravenes Home Depot's jury trial rights under the Seventh Amendment and this Court's decision in *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931).

Respondents make three unpersuasive efforts to deflect these points. First, respondents point to cases in which courts have certified Title VII actions for class treatment in bifurcated proceedings. Opp. 15-17 & n.7. The ready answer is that all of these cases were decided prior to the 1991 Amendments to the Civil Rights Act of 1964, which created a jury trial right for the first time in such cases. In short, respondents simply repeat the District Court's error. By focusing exclusively on *pre-1991* cases, respondents completely ignore the danger that Title VII bifurcation orders pose to the Seventh Amendment.

Second, respondents also make the inexplicable and indefensible claim that different legal standards apply in Title VII class action cases than in individual Title VII cases. Opp. 19-21. In particular, respondents rely on *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977), to argue that this Court's burden-shifting framework in Title VII cases works differently in individual lawsuits than it does in class action cases. *Id.* This misguided argument badly distorts established Title VII law.

This Court in *Teamsters* simply created an alternative to the *McDonnell-Douglas* framework for an individual to establish a prima facie case of discrimination. 431 U.S. at 358. Once a pattern or practice of discrimination is established under *Teamsters*, the burden shifts to the employer to rebut the presumption of discrimination toward each individual class member. *Id.* at 362. Nothing in *Teamsters* purports to prescribe the framework for such rebuttal, which was established in *St. Mary's*, 509 U.S. at 506-07. As explained previously, the application of *St. Mary's* "requires follow-up juries to consider the totality of the circumstances in order to make the ultimate determination whether there was intentional

discrimination" against each individual class member, Pet. 12, which will violate Home Depot's Seventh Amendment rights.[5]

Finally, respondents try to avoid these issues altogether by claiming that the District Court's order certifying the class in this case and ordering a bifurcated trial is somehow "preliminary" and thus the Seventh Amendment claim is not ripe. First and most fundamentally, this ripeness objection was raised and rejected in *Rhone-Poulenc* and in *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996). The ripeness question is simply part and parcel of the circuit split that Home Depot has asked the Court to review.

In addition, respondents' claim that this case is premature because "the district court has not yet certified the damages phase of the trial, or determined whether the same jury or different juries will hear the damages phase," Opp. 9, is belied by the terms of the District Court's order. The District Court in this case granted "the plaintiff's motion for class certification" *with respect to the entire case*. Pet. App. 11a. It then "further order[ed] that this litigation be bifurcated into separate phases." *Id.* at 12a. If, as respondents assert, the court had "not yet certified the damages phase," it presumably would have bifurcated the trial first and certified the class only as to the first phase. This is not what happened.

What is more, there is no question that -- whatever precise form the second phase of this litigation takes -- it will have to utilize multiple juries. The class certified in this case comprises more than 217,000 present and former female employees of Home Depot and rejected female applicants. Respondents cannot argue in good faith that there is *any* chance that a single

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[5] If (contrary to fact) respondents were correct, and the substantive law of Title VII did vary depending on whether it was applied in an individual suit or a class action, that result would plainly violate the Rules Enabling Act, 28 U.S.C. § 2072, for the Rules of Civil Procedure promulgated by this Court cannot be interpreted so as to modify substantive law enacted by Congress. *See, e.g., In re Fibreboard Corp.*, 893 F.2d 706, 711-12 (5th Cir. 1990); *In re Hotel Tel. Charges*, 500 F.2d 86, 89 (9th Cir. 1974).

jury will be empaneled to hear and decide the individual damage claims of each and every one of these class members.

In sum, there is nothing "hypothetical" about the procedure that has been dictated by the District Court's orders in this case. The District Court's order makes it crystal clear that different juries inevitably will consider overlapping issues of liability in direct violation of the Seventh Amendment. There is nothing premature about this constitutional violation and nothing to be gained from delaying plenary review.

III. THE CIRCUITS ARE CLEARLY SPLIT OVER WHETHER A BIFURCATED CLASS ACTION VIOLATES A DEFENDANT'S SEVENTH AMENDMENT RIGHTS.

Respondents make a feeble attempt to dismiss the existing split of authority on the Seventh Amendment issue on the ground that the decisions of the other Courts of Appeals on this issue were not rendered in Title VII cases. This is a classic distinction without a difference. As Home Depot has already outlined in detail, there is a clear split of authority on whether the Seventh Amendment permits class certification where separate "follow-up" juries will be required to reconsider issues already decided by a single "common issues" jury. *See* Pet. 14-21 (discussing cases). As petitioners have already outlined in detail, the First, Fifth and Seventh Circuits have concluded that this Court's opinion in *Gasoline Products* holds that the Seventh Amendment does not permit such a certification. In contrast, the Third, Fourth, Sixth and Ninth Circuits have dismissed the Seventh Circuit's *Rhone-Poulenc* decision, and its progeny, holding instead that the efficiencies gained by certifying these class actions are manifold, while downplaying the Seventh Amendment interests outlined in *Gasoline Products*. *See also In re Copley Pharm., Inc.*, 161 F.R.D. 456, 462 (D. Wyo. 1995) (recognizing the split). The fact that most of the prior cases involved the application of Rule 23 in a mass tort context does not make the split any less real.

There is nothing in these opinions that limits the reasoning or holdings to the "mass tort" context, nor do respondents offer any compelling reason why they should be so limited.[6] Respondents' allegation that the "claims, defenses and evidence" are different in mass tort cases and Title VII cases is inconsequential, as the same is true even within the "mass tort" context. Defenses available in a cigarette case (such as assumption of the risk) might not be available in an asbestos case. Yet even Respondents do not contend that no split exists, for example, between *Castano* and *In re School Asbestos Litig.*, 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 915 (1986).

What is at issue in all of these cases -- including this case -- is whether the "common issues" decided by the jury in the first phase can be "severed" from those issues that must be decided by separate "follow-up" juries in the second phase. As Home Depot has demonstrated, these issues cannot be "carved at the joint" in Title VII cases any more than in other kinds of tort cases. *Rhone-Poulenc*, 51 F.3d at 1302.

IV. THIS PETITION SHOULD -- AT A MINIMUM -- BE HELD PENDING THE COURT'S DECISION IN *ADAMS V. ROBERTSON*, NO. 95-1873.

Home Depot also challenged the District Court's decision to certify a class seeking primarily monetary relief under Rule 23(b)(2). Home Depot maintains that certification of such a class under 23(b)(2), which does not permit class members to opt out of the suit, violates either Rule 23 or the due process rights of objecting class members. Home Depot noted in its petition that the Court is currently considering this constitutional issue in *Adams v. Robertson*, 676 So.2d 1265

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[6] In fact, both *Rhone-Poulenc* and *Castano* relied heavily on previous Fifth Circuit decisions rendered in the antitrust context, *see, e.g.*, *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 318 (5th Cir. 1978), while the Ninth Circuit's decision in *Arthur Young & Co. v. United States Dist. Ct.*, 549 F.2d 686, 696 (9th Cir.), *cert. denied*, 434 U.S. 829 (1977), was a securities case.

(Ala. 1995), *cert. granted,* 117 S.Ct. 37 (1996), and noted that this case, unlike *Adams* or the first case raising the issue, *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994) (*per curiam*) (dismissing petition as improvidently granted), presents both the Rule 23 issue and the constitutional question. As a consequence, Home Depot suggested that the Court could substitute this petition for *Adams*, decide the two cases together, or, at a minimum, hold this case until *Adams* is decided.

Respondents oppose these suggestions with three claims: (1) that Home Depot did not raise the due process issue below, (2) that it lacks standing to raise this claim, and (3) that *Adams*, is unrelated to this case. Opp. 25-27.

Once again, Respondents strike out. In the first place, Home Depot raised due process concerns below. Home Depot's Brief in Opposition to Class Certification at 18 (Filed May 26, 1995). In addition, Home Depot clearly had standing to raise this claim under *Phillips Petroleum v. Shutts,* 472 U.S. 797 (1985). Contrary to respondents' suggestion, Home Depot is in the same position and has the same interest as the petitioner in *Shutts* -- namely to ensure that, assuming *arguendo* that certification is appropriate, all class members are bound by the judgment. This Court held in *Shutts* that the defendant had standing to raise the due process issue because "it would be obviously and immediately injured" if the class action did not bind all class members. 472 U.S. at 805.

Respondent's third claim is that *Adams* is inapplicable to this case because of the possibility that the District Court will eventually certify some of the damage issues under Rule 23(b)(3), which provides for an opt-out right. In that event, respondents reason, all class members will have the right to opt out and pursue their individual damage claims. The problem with this argument is that it assumes that respondents will win at the first phase. If, however, the District Court exonerates Home Depot in the common-issues trial, the damage claims of

the individual class members will be extinguished, even though they never had a right to opt out.[7]

Finally, respondents propose a new rule of Supreme Court practice -- that petitions in an interlocutory posture are somehow ineligible to be held pending resolution of another petition. Respondents offer no support for this novel proposal. If this Court resolves the *Adams* case, then that decision will no doubt provide substantial guidance to the lower courts on remand. On the other hand, should the Court identify a procedural problem with the *Adams* case or fail to reach a decision for some other reason, this petition could provide an alternative vehicle. *See, e.g.*, *Plaut v. Spendthrift Farms*, 115 S.Ct. 1447 (1995). For these reasons, the Court should, at a minimum, hold this case pending the outcome of *Adams*.

CONCLUSION

For these reasons, as well as those stated in the petition, a writ of certiorari should be granted or, in the alternative, this petition should be held pending the Court's resolution of *Adams v. Robertson*, No. 95-1873.

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[7] This is perhaps most obvious with respect to punitive damages. The District Court's order provides that in the first phase the jury will determine "whether defendant is liable for punitive damages." App. 12a. If the "common issues" jury finds that Home Depot is not liable for punitive damages, then class members will lose those claims before they can exercise an opt-out right.

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